REPORT

ON

THE LIABILITY OF THE CROWN

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY

1989

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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EXECUTIVE SUMMARY

In its *Report on the Liability of the Crown*, the Ontario Law Reform Commission has three general objectives in view:

(1) to make the law fairer to both Crown and citizen;

(2) to bring the law into conformity with the general principles underlying the *Canadian Charter of Rights and Freedoms*, and

(3) to simplify the law.

The Commission has identified a number of anomalous and unjustified privileges and immunities that continue to be enjoyed by the Crown in its dealings with ordinary persons, despite major reforms in 1963. These various privileges and immunities not only occasionally work injustice in individual cases; they also create unnecessary complications in the law and legal hazards to persons dealing with the Crown.

In the Commission's view, the present law governing liability of the Crown, insofar as it still provides privileges and immunities not enjoyed by ordinary persons, is inconsistent with popular conceptions of government. Crown immunities are particularly contrary to a deeply-held notion that the government and its officials ought to be subject to the same legal rules as private individuals, and should be accountable to injured citizens for its wrongful conduct. A key element of this concept is the fact that the application of ordinary principles of law to government is placed in the hands of the ordinary courts, who are independent of government and therefore capable of being relied upon to award an appropriate remedy to a person who has been injured by unlawful government action.

The Commission observes that these longstanding constitutional notions of the rights of individuals *vis-à-vis* the state have been most recently exemplified, and immeasurably strengthened, by the passage of the *Canadian Charter of Rights and Freedoms* and by the broad and purposive approach that the Supreme Court of Canada has adopted in its interpretation. The Charter is, in that broad sense, the philosophical backdrop against which the reform proposals in the Report are made.

In asserting as a general principle that the government and its servants should be subject to the ordinary law, the Commission does not deny that the Crown may require some unique powers and immunities in order to govern effectively. This reality is acknowledged throughout the Report. The Commission emphasizes, however, that a long and powerful tradition requires that the scope of such powers and immunities must be carefully defined and should be no broader than is necessary to fulfil the particular

policy and purpose for which they have been granted. The reform proposals in the Report are intended to replace the current hodge-podge of rules, presumptions, privileges and immunities, largely based on an anachronistic historical rationale, with a rational and carefully designed set of rules appropriate to contemporary notions of government and citizen rights.

The Commission therefore recommends that a new *Crown Liability Act* should be enacted to implement the reform proposals made in the Report. The general and overarching recommendation is that the privileges of the Crown in respect of civil liabilities and civil proceedings should be abolished, and the Crown and its servants and agents should be subject to all the civil liabilities and rules of procedure that are applicable to other persons who are of full age and capacity. This recommendation is intended to apply with respect to all causes of action, including tort, contract, restitution, and breach of trust. The specific implications of this general proposal, and certain limited exceptions to it, are canvassed in succeeding chapters of the Report.

The first specific area of Crown liability considered by the Commission is that of tort law. After identifying certain gaps in the direct tortious liability of the Crown, the Commission explains that its general recommendation is intended to encompass all kinds of civil liability, and would accordingly abolish any residual immunities of the Crown in tort. However, the Commission specifically recommends the abolition of a statutory provision that creates a Crown immunity with respect to property that vests by operation of law and without its knowledge.

The Commission next considers certain statutory immunities from civil liability enjoyed by many Crown employees in Ontario. The Commission concludes that ordinary principles of employment law, which allow for indemnification of employees by employers where appropriate, should govern the Crown and its servants or agents as well. The Commission recommends that all statutory immunity clauses should be repealed and replaced by an appropriate scheme of indemnity within two years after the proclamation of the new *Crown Liability Act*.

The Report then reviews the current civil liability of judicial and quasi-judicial decision makers. The Commission concludes that there is no principled reason for treating quasi-judicial decision makers differently than judges with respect to tortious liability, and recommends that every member of a board, commission or tribunal should enjoy the same immunity accorded to superior court judges when performing duties of a judicial nature.

The Commission concludes its discussion of tortious liability of the Crown by recommending the abolition of certain statutory provisions that currently preserve the Crown from vicarious liability with respect to conduct for which it should properly be liable.

In chapter 3, the Commission reviews the contractual liability of the Crown and finds the current law to be generally satisfactory. The earlier recommendations that the Crown should be subject to all the civil liabilities

applicable to a private person, and that statutory immunity clauses protecting Crown servants should be abolished, would apply equally to contractual liability of the Crown. The Commission specifically recommends the abolition of an existing common law doctrine that prohibits the Crown from fettering its discretion by contract.

In chapter 4, dealing with remedies, the Commission indicates that the Crown remains immune from injunction, specific performance, and orders in the nature of mandamus, prohibition, and certiorari under the *Judicial Review Procedure Act*. The Commission concludes that these immunities are unjustified, and recommends their abolition. It is further recommended that an anomalous and unnecessary procedure to obtain declaratory relief against the Attorney General, known as the *Dyson* procedure, should be abolished.

In chapter 5, the Commission deals with a variety of procedural and related matters. First, it considers the common law rule of Crown privilege with respect to disclosure of evidence. The Commission concludes that the current law, as established in *Carey v. The Queen in Right of Ontario*, is generally satisfactory. However, for greater certainty, it recommends that the rule should be expressly included as part of the proposed *Crown Liability Act*. The Commission also recommends the repeal of section 12 of the present *Proceedings Against the Crown Act*, which deals with disclosure and privilege in an incomplete and inappropriate manner.

The Commission then indicates that the current obligation of the Crown to give discovery is limited and unsatisfactory, and recommends that the Crown should be liable to give discovery in the same manner as if the Crown were a corporation. It also concludes that the current statutory prohibition with respect to jury trials against the Crown is unjustified, and recommends its repeal. And finally in this chapter, the Commission reviews the present state of the law relating to special limitation and notice periods in actions involving the Crown. It observes that it has recommended appropriate reform measures with respect to these matters in its 1969 *Report on Limitation of Actions*, and calls once again for their implementation.

In chapter 6, the Report turns to the enforcement of judgments, costs and interest. The Commission reviews the current immunity of the Crown from the enforcement mechanisms of execution and garnishment of debts owing to the Crown by third parties. The Commission concludes that a continuation of these immunities is justified on two grounds: first, such debts are almost invariably paid without recourse to enforcement mechanisms because the Treasurer for Ontario is under a statutory obligation to pay judgment debts; secondly, the potentially disruptive effect of seizure of public property militates strongly against providing such recourse. A recommendation is made, however, that certain residual Crown immunities from garnishment of debts owed by the Crown to a third party judgment debtor should be abolished.

The Commission then discusses the current immunity of the Crown from civil contempt for breach of a court order, and concludes that the

historical rationale for that immunity is no longer persuasive. Under the Commission's proposals, the Crown would be liable for civil contempt to the same extent as if the Crown were a corporation. It is further recommended that, where the Crown is found in contempt, the court should direct its order to the minister responsible for the affairs of the particular ministry involved. In appropriate circumstances, the order could also be made against a Crown employee or agent.

As to the issue of costs, the Commission is of the view that the present law governing the liability of the Crown appears to be operating satisfactorily. However, to remove one area of possible uncertainty, it recommends that the Crown should receive and pay costs in accordance with the rules that apply between private persons. Finally, in chapter 6, the Commission finds that, since the Crown is now under the same obligation to pay interest as a private person, no change in the law is necessary.

In chapter 7 of the Report, an examination is made of the extent to which the Crown is subject to statutes. The Commission finds that the courts' unease with the existing general rule, which provides that the Crown is bound by statutes only where there is an express statement or by necessary implication, has given rise to an extraordinarily complicated body of case law. The Commission concludes that the current presumption should be reversed to provide that the Crown is subject to statute as any other person, and recommends that the *Interpretation Act* should be amended to provide that every act and regulation made under it binds the Crown unless otherwise specifically provided.

The final chapter of the Report reviews the law governing Crown agency and indicates that the status of Crown agent is determined either on the basis of the common law test of control or by express statutory designation. The Commission finds that the *Crown Agency Act*, which purports to confer Crown agency status on an ill-defined class of public bodies, does not alter this general rule. While acknowledging that the control test is subject to some uncertainty, the Commission concludes that the test operates in a generally satisfactory manner. The alternative of relying exclusively on an express statutory designation would not be satisfactory because it could narrow the range of persons who are Crown agents, and consequently limit the Crown's vicarious liability. The Commission also rejects the option of attempting to create a new definition of Crown agency, which would almost invariably suffer the interpretive uncertainty of the control test without the advantage of the courts' familiarity with that test. In the end, the Commission recommends that a Crown agent should continue to be identified by either the control test or by express statutory declaration. It further recommends that the *Crown Agency Act* and section 2(2) of the *Proceedings Against the Crown Act*, which exempts the Crown from liability in respect of a cause of action that is enforceable against a corporate Crown agent, should be abolished.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

CHAPTER 1: GENERAL INTRODUCTION

1. A new *Crown Liability Act* should be enacted to include the reform proposals made in this report.

2. The privileges of the Crown in respect of civil liabilities and civil proceedings should be abolished, and the Crown and its servants and agents should be subject to all the civil liabilities and rules of procedure that are applicable to other persons who are of full age and capacity.

3. Recommendation 2 should apply with respect to all causes of action, including tort, contract, restitution, and breach of trust.

4. The responsibility for reviewing legislation, with an eye to identifying consequential amendments not specifically recommended in this report, should be left to each ministry responsible for the particular legislation.

CHAPTER 2: TORT

5. All statutory immunity clauses protecting Crown servants should be repealed and replaced by an appropriate scheme of indemnity.

6. The abolition of all statutory immunity clauses should come into force two years following the proclamation of the proposed *Crown Liability Act*.

7. Every member of a board, commission or tribunal should enjoy the same immunity accorded to superior court judges when performing duties of a judicial nature.

8. Section 2(2)(d) of the *Proceedings Against the Crown Act*, which exempts the Crown from liability in respect of anything done in the due enforcement of the criminal law, should be repealed.

9. Section 5(5) of the *Proceedings Against the Crown Act*, which immunizes the Crown from liability with respect to property that vests by operation of law, should be abolished.

10. Section 5(6) of the *Proceedings Against the Crown Act* should be repealed, and the proposed *Crown Liability Act* should expressly provide that the Crown is vicariously liable for the tort of any person committed in the course of the exercise or purported exercise of judicial responsibilities or duties.

CHAPTER 3: CONTRACT

11. Our general recommendation 2 will ensure that the Crown and its agents and servants will be subject to all contractual liability to which they would be liable if the Crown were a person of full age and capacity.

12. The doctrine that the Crown cannot fetter its discretion by contract should be abrogated by the proposed *Crown Liability Act*. The Act should provide that a contract made on behalf of the Crown is valid and enforceable even if the contract fetters discretionary powers conferred by statute or common law.

13. Recommendation 5, that statutory immunity clauses should be abolished and replaced by an appropriate scheme of indemnity for Crown employees, should apply as well with respect to contractual liability of Crown servants and agents.

CHAPTER 4: REMEDIES

14. Since damages are available against the Crown, no change in the law is needed or recommended.

15. The new *Crown Liability Act* should provide that the remedies of injunction and specific performance are available against the Crown.

16. The procedure for obtaining relief against the Crown by an action for a declaration against the Attorney General, known as the *Dyson* procedure, should be abolished.

17. The immunity of the Crown from orders in the nature of mandamus, prohibition, and certiorari under the *Judicial Review Procedure Act* should be abolished.

18. Since there is no Crown immunity from *habeas corpus*, and no such immunity is desirable, no change in the law is recommended.

CHAPTER 5: PROCEDURAL AND RELATED MATTERS: EVIDENCE, APPEALS, DISCOVERY, JURY TRIALS, AND LIMITATION OF ACTIONS

19. (a) The common law rule of Crown privilege, as established in *Carey v. The Queen in Right of Ontario*, is generally satisfactory and need

not be altered. However, for greater certainty, we recommend that the rule should be expressly included as a part of the new *Crown Liability Act*.

(b) The statutory provision should provide that, where Crown privilege is claimed with respect to any evidence, documentary or otherwise, the court may examine the evidence.

(c) The court should allow disclosure of the evidence, unless it is satisfied that the injury to the public interest that would be caused by disclosure would outweigh the injury to the administration of justice that would be caused by withholding the evidence.

(d) The proposed Act should provide that the court has the power to inspect privately the evidence for which Crown privilege is claimed.

(e) In the appropriate circumstances, the court should be entitled to order limited disclosure, subject to such terms and conditions as it deems necessary.

20. Section 12 of the *Proceedings Against the Crown Act*, which relates to the issues of disclosure and privilege, should be repealed.

21. The Crown should be liable to give discovery to the same extent and in the same manner as if the Crown were a corporation.

22. Section 15 of the *Proceedings Against the Crown Act*, which prohibits jury trials against the Crown, should be repealed.

23. The proposals in the Commission's 1969 *Report on Limitation of Actions* should be implemented.

CHAPTER 6: ENFORCEMENT OF JUDGMENTS, COSTS, AND INTEREST

24. The Crown's immunity from execution should be continued.

25. The Crown's immunity from garnishment as a means of enforcing judgment debts owed by the Crown should be continued.

26. The residual immunities from garnishment of debts owed by the Crown to a third party judgment debtor should be eliminated, and all such debts owed by the Crown should be subject to garnishment.

27. The Crown should be liable for civil contempt for breach of a court order to the same extent as if the Crown were a corporation. The court should also have the power, on finding the Crown to be in contempt, to make an order against an officer or servant of the Crown. The court

should normally direct its contempt order to a minister, who should bear responsibility for all the work of the ministry under her control. However, in appropriate circumstances, the court should be able to penetrate the bureaucracy and fasten its orders on an individual below the ministerial level, as well as on the responsible minister.

28. A new *Crown Liability Act* should provide that the Crown shall receive and pay costs in accordance with the same rules as apply between private parties.

29. Since the Crown is under the same obligation to pay interest as a private person, and there is no reason to place the Crown in a different position, no change in the law is recommended.

CHAPTER 7: STATUTES

30. The *Interpretation Act* should be amended to provide that every Act and regulation made under it binds the Crown unless the Act or regulation specifically provides otherwise.

CHAPTER 8: CROWN AGENCIES

31. A Crown agent should continue to be identified by either the control test or by express declaration in the relevant statute.

32. The *Crown Agency Act* should be repealed.

33. Section 2(2)(b) of the *Proceedings Against the Crown Act*, which exempts the Crown from liability in respect of a cause of action that is enforceable against a corporate Crown agent, should be repealed.

RAPPORT

SUR

LA RESPONSABILITÉ DE LA COURONNE

Commission de réforme du droit de l'Ontario

SOMMAIRE

1989

La Commission de réforme du droit de l'Ontario a été constituée en vertu de la *Loi sur la Commission de réforme du droit de l'Ontario* avec pour mission de réformer le droit, les procédures et les institutions juridiques.

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SOMMAIRE

Dans son *Report on the Liability of the Crown*, la Commission de réforme du droit de l'Ontario vise les trois objectifs généraux suivants :

(1) rendre les règles de droit plus justes à l'égard de la Couronne comme à l'égard du citoyen;

(2) rendre les règles de droit plus conformes aux principes généraux qui sous-tendent la *Charte canadienne des droits et libertés*;

(3) simplifier les règles de droit.

Le rapport rappelle qu'à la suite d'une réforme en profondeur en 1963, la Couronne en Ontario est généralement soumise aux mêmes règles de droit que le simple citoyen. La Commission a cependant relevé un certain nombre d'immunités et de privilèges anormaux et injustifiés dont, malgré cette réforme, la Couronne continue de jouir vis-à-vis de l'individu. Ces divers privilèges et immunités non seulement sont source d'injustice dans les cas d'espèce, mais ils donnent encore lieu à une complication inutile du droit ainsi qu'à des aléas juridiques qui jouent contre les gens ayant à faire avec la Couronne.

De l'avis de la Commission, les règles de droit qui régissent à l'heure actuelle la responsabilité de la Couronne, du fait qu'elles prévoient encore des privilèges et immunités dont ne jouit pas le simple citoyen, vont à l'encontre de l'idée que se fait le peuple du gouvernement. Les immunités de la Couronne en particulier s'opposent à la croyance bien ancrée, selon laquelle l'État et ses représentants doivent être soumis aux mêmes règles de droit que l'individu, et doivent être comptables d'actes non autorisés envers les citoyens lésés. Un élément essentiel de ce concept est que l'application à l'État des principes ordinaires de droit appartient aux tribunaux de droit commun, que tout un chacun tient pour indépendants de l'exécutif et sur lesquels on peut donc compter pour faire justice à l'individu lésé par une action illégale de l'État.

La Commission constate que le principe constitutionnel, établi de longue date, des droits de l'individu face à l'État a été tout récemment mis en relief et considérablement renforcé par l'adoption de la *Charte canadienne des droits et libertés* et par l'interprétation large et proactive que la Cour suprême du Canada en a donnée. La Charte est, dans un sens large, la fondation philosophique sur laquelle ont été bâties les propositions de réforme contenues dans le rapport.

En réaffirmant le principe général selon lequel l'État et ses mandataires doivent être soumis aux règles de droit ordinaires, la Commission ne

nie pas que la Couronne puisse avoir besoin de certains pouvoirs et immunités spéciaux afin de gouverner convenablement. Cette réalité est reconnue tout au long du rapport. La Commission fait ressortir cependant que selon une grande tradition de longue date, la portée de ces pouvoirs et immunités doit être soigneusement définie et ne doit pas dépasser ce qui est nécessaire pour la réalisation de la politique et de l'objectif pour lesquels ils ont été conférés. Les recommandations de réforme du rapport visent à remplacer une mosaïque de règles, de présomptions, de privilèges et d'immunités, fondés en grande partie sur des considérations qui avaient leur raison d'être par le passé mais qui sont devenues maintenant anachroniques, par un ensemble rationnel et soigneusement conçu de règles adaptées aux concepts contemporains d'État et de droits du citoyen.

En conséquence, la Commission recommande l'adoption d'une nouvelle *Loi sur la responsabilité de la Couronne* pour mettre en oeuvre les propositions de réforme contenues dans ce rapport. La recommandation générale et primordiale en est que les privilèges de la Couronne en matière de responsabilité civile et d'actions civiles soient abolis, et que la Couronne et ses employés et mandataires soient soumis aux mêmes responsabilités et aux mêmes règles de procédure que n'importe quelle personne ayant atteint la majorité et jouissant de sa pleine capacité juridique. Cette recommandation vise toutes les causes d'action, dont le délit civil, les contrats, la réparation et l'abus de confiance. Les implications spécifiques de cette proposition générale, ainsi que certaines exceptions restrictives, sont analysées dans les chapitres successifs du rapport.

Le premier domaine spécifique de responsabilité civile de la Couronne, qu'a examiné la Commission, est celui du délit civil. Après avoir relevé certaines lacunes dans la responsabilité délictuelle directe de la Couronne, la Commission explique que sa recommandation générale s'étend à toutes les catégories de responsabilité civile et, par conséquent, vise à l'abolition de tout vestige d'immunité de la Couronne en la matière. Elle recommande cependant expressément l'abrogation de la disposition qui prévoit l'immunité de la Couronne à l'égard des biens qui lui sont dévolus par l'effet de la loi.

La Commission examine ensuite certaines immunités en matière de responsabilité civile, qu'un grand nombre d'employés de la Couronne tiennent de la loi en Ontario. La Commission conclut que les principes communs du droit du travail qui prévoient, le cas échéant, la garantie de l'employé par l'employeur, doivent également régir les relations entre la Couronne et ses employés ou mandataires. Elle recommande que tous les textes de loi portant immunité soient abrogés et remplacés par un régime de garantie convenable dans les deux ans qui suivent la promulgation de la nouvelle *Loi sur la responsabilité de la Couronne*.

Au sujet du régime actuel de responsabilité civile des autorités judiciaires ou quasi judiciaires, la Commission conclut que rien ne justifie de traiter les autorités quasi judiciaires différemment des juges en matière de

responsabilité délictuelle, et recommande que dans l'exercice de leurs fonctions judiciaires, les membres de tout conseil, commission ou tribunal administratif jouissent de la même immunité que les juges des cours supérieures.

En conclusion de son analyse de la responsabilité délictuelle de la Couronne, la Commission recommande l'abrogation de certains textes de loi qui protègent la Couronne de la responsabilité indirecte à l'égard d'agissements dont elle doit répondre.

Au chapitre 3, la Commission analyse la responsabilité contractuelle de la Couronne et conclut que les règles de droit en vigueur sont satisfaisantes dans l'ensemble. Les recommandations précédentes, à savoir que la Couronne devrait être soumise à toutes les responsabilités civiles applicables au citoyen ordinaire et que les dispositions légales d'immunité qui protègent la Couronne et ses employés devraient être abrogées, s'appliquent également à la responsabilité contractuelle de la Couronne. La Commission recommande expressément l'abolition d'un principe de common law en vigueur, qui interdit à la Couronne d'entraver ses propres pouvoirs discrétionnaires par voie contractuelle.

Au chapitre 4 qui porte sur les recours, la Commission constate que la Couronne continue de jouir de l'immunité à l'égard des injonctions, des exécutions en nature, des ordonnances de mandamus, de prohibition et de certiorari que prévoit la *Loi sur la procédure de révision judiciaire*. La Commission conclut que cette immunité est injustifiée et en recommande l'abolition. Elle recommande également l'abolition d'une procédure anormale et inutile en jugement déclaratoire contre le Procureur général, la soi-disant procédure Dyson.

Le chapitre 5 est consacré à une variété de questions de procédure et matières connexes. La Commission considère tout d'abord la règle de common law concernant le privilège de la Couronne en matière de communication de la preuve. Elle conclut que la règle de droit en vigueur, telle qu'elle a été établie par l'arrêt *Carey v. The Queen in Right of Ontario*, est satisfaisante dans l'ensemble. Pour plus de certitude cependant, elle en recommande l'inclusion expresse dans la nouvelle *Loi sur la responsabilité de la Couronne* proposée. Elle recommande également l'abrogation de l'article 12 de la *Loi sur les instances introduites contre la Couronne* en vigueur, qui est incomplet et peu satisfaisant pour ce qui est de la communication de la preuve et du privilège de la Couronne dans ce domaine.

La Commission fait ressortir que l'obligation qui incombe à l'heure actuelle à la Couronne de communiquer la preuve est limitée et insatisfaisante, et recommande que la Couronne soit tenue à cette obligation au même titre que les personnes privées. La Commission conclut aussi que l'interdiction faite actuellement par la loi des procès avec jury contre la Couronne n'est pas justifiée et doit être abolie. En dernier lieu, la Commission examine le droit en vigueur en matière de prescription spéciale et

de délais de préavis dans les actions concernant la Couronne. Elle rappelle à ce sujet qu'elle a recommandé des mesures de réforme appropriées dans son *Report on Limitation of Actions* de 1969 et en préconise de nouveau la mise en oeuvre.

Le chapitre 6 porte sur l'exécution des jugements, ainsi que le paiement des dépens et intérêts. La Commission y examine l'immunité dont jouit à l'heure actuelle la Couronne à l'égard des mécanismes d'exécution et de saisie-arrêt des dettes que lui doivent les tierces parties. La Commission conlut que le maintien de ces immunités se justifie par deux motifs: en premier lieu, ces dettes sont presque invariablement réglées sans le secours des mécanismes d'exécution parce que le Trésorier de l'Ontario est tenu par la loi d'acquitter les dettes confirmées par jugement; en second lieu, l'effet potentiellement perturbateur de la saisie de biens-fonds publics milite contre pareil recours. La Commission recommande en revanche l'abolition d'une certaine immunité résiduelle à l'égard de la saisie-arrêt de dettes que la Couronne doit aux tierces parties.

En analysant l'immunité dont jouit encore la Couronne pour ce qui est de l'outrage civil pour cause de violation d'ordonnance judiciaire, la Commission conclut que la justification historique de cette immunité n'est plus valide de nos jours et recommande que la Couronne soit tenue à l'outrage civil au même titre que les personnes morales. Elle recommande en outre que dans le cas où la Couronne est déclarée coupable d'outrage, le tribunal adresse son ordonnance au ministre responsable des affaires du ministère en cause. Le cas échéant, le tribunal pourrait rendre une ordonnance contre un employé ou mandataire de la Couronne.

Au sujet des dépens, la Commission approuve les règles de droit régissant à l'heure actuelle la responsabilité de la Couronne. Il reste cependant une incertitude à éliminer, et la Commission recommande que pour recevoir ou payer les dépens, la Couronne soit soumise aux règles applicables aux personnes de droit privé. Enfin, au chapitre 6, la Commission conclut que, puisque la Couronne est maintenant tenue au paiement des intérêts au même titre que les particuliers, aucun changement ne s'impose dans les règles de droit en la matière.

Au chapitre 7 du rapport qui porte sur la question de savoir dans quelle mesure la Couronne est soumise aux lois écrites, la Commission constate que l'incertitude des tribunaux devant la règle générale en vigueur, selon laquelle la Couronne n'est pas soumise aux lois écrites sauf disposition expresse ou implication inéluctable, a donné lieu à une jurisprudence extrêmement compliquée. La Commission conclut qu'il y a lieu d'inverser la présomption en vigueur pour prévoir que la Couronne est soumise aux lois écrites comme toute autre personne, et recommande que la *Loi d'interprétation* soit modifiée de façon à prévoir que toute loi et tout règlement pris pour son application aient force obligatoire à l'égard de la Couronne, sauf disposition contraire expresse.

Le dernier chapitre du rapport examine les règles de droit régissant les mandataires de la Couronne, en faisant ressortir que leur qualité est définie soit en fonction du critère du contrôle de la common law soit en fonction d'une désignation légale expresse. La Commission constate que la *Loi sur les organismes de la Couronne*, qui vise à conférer cette qualité à une catégorie mal définie d'organismes publics, ne change rien à la règle générale. Tout en reconnaissant que le critère du contrôle est plus ou moins affligé d'incertitude, la Commission conclut que son fonctionnement est satisfaisant dans l'ensemble. La solution de rechange qui consiste à recourir exclusivement à la désignation légale ne serait pas satisfaisante puisqu'elle pourrait avoir pour effet de restreindre le nombre de personnes reconnues comme mandataires de la Couronne et partant, de limiter la responsabilité indirecte de l'État. La Commission rejette par ailleurs l'option qui consiste à créer une nouvelle définition de mandataire de la Couronne, définition qui souffrirait presque inéluctablement de l'incertitude d'interprétation affligeant le critère du contrôle, et qui éliminerait en outre l'avantage de la familiarité des tribunaux avec ce dernier critère. La Commission recommande de continuer à définir les mandataires de la Couronne soit en fonction du critère du contrôle soit en fonction d'une désignation légale expresse. Elle recommande en outre l'abrogation de la *Loi sur les organismes de la Couronne* et du paragraphe 2(2) de la *Loi sur les instances introduites contre la Couronne*, qui exonère l'État de toute responsabilité à l'égard des causes d'action susceptibles d'exécution contre les sociétés de la Couronne.

SOMMAIRE DES RECOMMANDATIONS

La Commission fait les recommandations suivantes:

CHAPITRE 1: INTRODUCTION GÉNÉRALE

1. Il y a lieu d'adopter une nouvelle *Loi sur la responsabilité de la Couronne* qui reprendra les propositions de réforme contenues dans ce rapport.

2. Il y a lieu d'abolir les privilèges de la Couronne en matière de responsabilité et d'actions civiles, et la Couronne ainsi que ses employés et mandataires devront être soumis à toutes les responsabilités civiles et règles de procédure applicables aux personnes ayant atteint l'âge de la majorité et jouissant de la pleine capacité juridique.

3. La recommandation 2 ci-dessus doit s'appliquer à toutes les causes d'action, dont le délit civil, les contrats, la réparation et l'abus de confiance.

4. La responsabilité de revoir les lois en vue de dégager les modifications corollaires qui ne sont pas expressément recommandées dans ce rapport, doit incomber à chaque ministère compétent.

CHAPITRE 2: DÉLIT CIVIL

5. Il y a lieu d'abroger tous les textes de loi portant immunité de la Couronne et de les remplacer par un régime de garantie convenable.

6. L'abrogation de toutes les dispositions légales d'immunité devra entrer en vigueur deux ans après la promulgation de la nouvelle *Loi sur la responsabilité de la Couronne* proposée.

7. Tout membre de conseil, commission ou tribunal administratif devra, dans l'exercice de ses fonctions judiciaires, jouir de la même immunité que les juges des cours supérieures.

8. Il y a lieu d'abroger l'alinéa 2(2)d) de la *Loi sur les instances introduites contre la Couronne*, qui exonère la Couronne de toute responsabilité dans l'application légitime des règles de droit pénal.

9. Il y a lieu d'abroger le paragraphe 5(5) de la *Loi sur les instances introduites contre la Couronne*, qui exonère la Couronne de toute responsabilité au sujet des biens qui lui sont dévolus par l'effet de la loi.

10. Il y a lieu d'abroger le paragraphe 5(6) de la même loi, et il faut que la nouvelle *Loi sur la responsabilité de la Couronne* prévoie expressément que la Couronne est indirectement responsable du délit civil commis par toute personne dans l'exercice, effectif ou apparent, de fonctions judiciaires.

CHAPITRE 3: CONTRAT

11. Notre recommandation générale 2 fera en sorte que la Couronne et ses mandataires et employés soient tenus à toute responsabilité contractuelle, qui leur eût incombé si la Couronne était une personne ayant atteint l'âge de la majorité et jouissant de la pleine capacité juridique.

12. Il y a lieu d'abolir, au moyen de la nouvelle *Loi sur la responsabilité de la Couronne* proposée, la doctrine selon laquelle la Couronne ne peut restreindre ses propres pouvoirs discrétionnaires par voie de contrat. Cette loi devra prévoir qu'un contrat conclu pour le compte de la Couronne est valide et exécutoire même s'il restreint les pouvoirs discrétionnaires qu'elle tient d'un texte de loi ou de la common law.

13. La recommandation 5 portant abrogation des dispositions légales d'immunité, à remplacer par un régime approprié de garantie pour les employés de la Couronne, devra s'appliquer également à l'égard de la responsabilité contractuelle des employés et mandataires de la Couronne.

CHAPITRE 4: RECOURS

14. Étant donné que la Couronne peut être poursuivie en dommages-intérêts, aucune modification des règles de droit n'est nécessaire ni recommandée dans ce domaine.

15. La nouvelle *Loi sur la responsabilité de la Couronne* devra prévoir le recours en injonction et en exécution en nature contre la Couronne.

16. Il y a lieu d'abolir le recours contre la Couronne par action en jugement déclaratoire contre le Procureur général, recours connu sous le nom de procédure *Dyson*.

17. Il y a lieu d'abolir l'immunité de la Couronne à l'égard des ordonnances de mandamus, de prohibiton et de certiorari, que prévoit la *Loi sur la procédure de révision judiciaire*.

18. Étant donné que la Couronne ne jouit pas de l'immunité à l'égard des brefs de *habeas corpus* et que pareille immunité n'est pas souhaitable, aucune modification du droit n'est recommandée en la matière.

CHAPITRE 5: QUESTIONS DE PROCÉDURE ET MATIÈRES CONNEXES: PREUVE, APPELS, COMMUNICATION, PROCÈS PAR JURY ET PRESCRIPTION LÉGALE

19. a) La règle de common law portant privilège de la Couronne, telle qu'elle a été établie par l'arrêt *Carey v. The Queen in Right of Canada*, est satisfaisante dans l'ensemble et ne requiert aucune modification. Pour plus de certitude cependant, nous recommandons qu'elle soit expressément prévue à la nouvelle *Loi sur la responsabilité de la Couronne*.

b) Le texte de loi en la matière devra prévoir qu'en cas d'invocation du privilège de la Couronne à l'égard de toute preuve, documentaire ou autre, le tribunal saisi peut examiner cette preuve.

c) Le tribunal devra autoriser la communication de la preuve, à moins qu'il ne conclue que le risque d'une atteinte à l'intérêt public du fait de cette communication l'emporte sur le risque d'une atteinte à l'administration de la justice du fait de la non-communication.

d) La nouvelle loi devra prévoir que le tribunal est habilité à examiner en privé la preuve faisant l'objet du privilège revendiqué par la Couronne.

e) Le cas échéant, le tribunal devra être habilité à ordonner la communication limitée, aux conditions qu'il juge nécessaires.

20. Il y a lieu d'abroger l'article 12 de la *Loi sur les instances introduites contre la Couronne*, qui porte sur les questions de communication de la preuve et de privilège.

21. La Couronne devra être tenue à la communication de la preuve au même titre que toute personne morale.

22. Il y a lieu d'abroger l'article 15 de la *Loi sur les instances introduites contre la Couronne*, qui interdit les procès avec jury contre la Couronne.

23. Il y a lieu de mettre en oeuvre les recommandations contenues dans le *Rapport sur la prescription légale*, publié par la Commission en 1969.

CHAPITRE 6: EXÉCUTION DES JUGEMENTS, DU PAIEMENT DES DÉPENS ET DES INTÉRETS

24. Il y a lieu de maintenir l'immunité de la Couronne en matière d'exécution.

25. Il y a lieu de maintenir l'immunité de la Couronne contre la saisie-arrêt opérée à titre d'exécution des dettes de la Couronne, confirmées en justice.

26. Il y a lieu d'abolir l'immunité résiduelle contre la saisie-arrêt en cas de dette due par la Couronne à une tierce partie, laquelle dette devra être susceptible de saisie-arrêt.

27. La Couronne devra être, au même titre que les personnes morales, tenue à l'outrage civil en cas de violation d'une ordonnance judiciaire. Dans le cas où la Couronne est déclarée coupable d'outrage, le tribunal compétent devra être habilité à rendre une ordonnance contre un représentant ou employé de la Couronne. Ce tribunal devra normalement adresser l'ordonnance d'outrage au ministre compétent, qui devra répondre de toutes les activités du ministère relevant de son autorité. Le cas échéant cependant, l'autorité judiciaire devra être en mesure de frapper directement les fonctionnaires et de diriger son ordonnance sur un individu qui est sous les ordres du ministre, ainsi que sur le ministre lui-même.

28. Une nouvelle *Loi sur la responsabilité de la Couronne* devra prévoir que la Couronne reçoit et paie les dépens conformément aux mêmes règles qui s'appliquent aux particuliers.

29. Étant donné que la Couronne est tenue au paiement des intérêts au même titre qu'un particulier et qu'il n'y a aucune raison de lui accorder un statut différent, aucune modification des règles de droit n'est recommandée en la matière.

CHAPITRE 7: LOIS ÉCRITES

30. Il y a lieu de modifier la *Loi d'interprétation* de façon à prévoir que, sauf disposition contraire expresse, toute loi et tout règlement pris pour son application ont force obligatoire à l'égard de la Couronne.

CHAPITRE 8: ORGANISMES DE LA COURONNE

31. Il y a lieu de continuer à définir les mandataires de la Couronne en fonction du critère du contrôle ou d'une désignation légale expresse.

32. Il y a lieu d'abroger la *Loi sur les organismes de la Couronne*.

33. Il y a lieu d'abroger l'alinéa 2(2)b) de la *Loi sur les instances introduites contre la Couronne*, qui exonère l'État de toute responsabilité à l'égard d'une cause d'action susceptible d'exécution contre un organisme de la Couronne.

REPORT

ON

THE LIABILITY OF THE CROWN

ONTARIO LAW REFORM COMMISSION

1989

90-06082/

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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Ontario
Law Reform
Commission

The Honourable Ian G. Scott, QC
Attorney General for Ontario

Dear Mr. Attorney:

We have the honour to submit herewith our *Report on the Liability of the Crown*.

PREFACE

The Project on the Liability of the Crown was initiated in March, 1986 to examine the legal liability of the Crown in right of Ontario and to make recommendations for reform.

The director of the project, Peter W. Hogg, Q.C., Professor of Law, Osgoode Hall Law School, York University, was appointed at the beginning of the project, and saw the project through to completion. Professor Hogg was assisted by a research team, which prepared working papers for the project. The Research Team consisted of Eric Gertner, Esq., Barrister and Solicitor, Toronto; Professor David S. Cohen, Faculty of Law, University of British Columbia; and Mario Bouchard, now Director of Legal Services, Federal Immigration Appeal Board. The draft Act that is appended to the Report was prepared by Arthur Stone, Q.C., former Director of Legislative Counsel Services, Ontario Ministry of the Attorney General.

Early in the project an advisory committee was established, comprising twelve members, drawn from the bench, the bar and the universities. The members of the advisory committee were: The Honourable Mr. Justice Marvin A. Catzman, Ontario Court of Appeal; Brian A. Crane, Q.C., Barrister & Solicitor, Ottawa; Carol M. Creighton, Q.C., Deputy Director, Constitutional Law Division, Ontario Ministry of the Attorney General; Eric Gertner, Barrister & Solicitor, Toronto; Sydney L. Goldenberg, Barrister & Solicitor, Toronto; Donald H. Jack, Barrister & Solicitor, Toronto; Professor Hudson N. Janisch, Faculty of Law, University of Toronto; Peter R. Jervis, Barrister & Solicitor, formerly Counsel, Constitutional Law Division, Ontario Ministry of the Attorney General; Thomas C. Marshall, Q.C., Director, Crown Law Civil Division, Ontario Ministry of the Attorney General; The Honourable Mr. Justice John W. Morden, Ontario Court of Appeal; Professor Marilyn L. Pilkington, Osgoode Hall Law School, York University; and Professor Robert J. Sharpe, Faculty of Law, University of Toronto.

The Law Reform Commission of Canada is currently working on a similar project, reviewing the legal status of the federal Administration. This project has yielded a working paper entitled *The Legal Status of the Federal Administration* (1985) and a study paper entitled *Immunity from Execution* (1987). Both these papers have proved useful for the Ontario project. John P. Frecker, the Commissioner in charge of the federal project, and Professor Hogg have remained in informal contact throughout the Ontario project, meeting from time to time, and sharing ideas and research material. In addition, the Department of Justice of the Government of Canada made available to the Commission some legal research material on Crown law that had been organized under the direction of Paul Lordon.

Professor Hogg was assisted by student research assistants throughout the project. They were: Ani M. Abdalyan, LL.B., 1987; Tony Bortolin, LL.B., 1987; Kristina Genjaga, LL.B., 1988; Gregory D. Lewis, LL.B., 1987; Vincent A. Mercier, LL.B., 1988; John Noonan, LL.B., 1989; Alva Orlando, LL.B., 1987; and Mary Scarfo, LL.B., 1987.

Counsel to the Ontario Law Reform Commission for most of the project was M. Patricia Richardson, who left in the summer of 1988, and was replaced by Melvin A. Springman. Judith Bellis wrote the final Report in consultation with Professor Hogg. The other staff person with responsibility for the project was Larry M. Fox.

The Commission wishes to thank Professor Hogg, the Research Team, and the Advisory Committee for their invaluable contributions throughout this Project. We are particularly grateful to Professor Hogg for sharing with us his remarkably extensive knowledge and understanding of this field.

CHAPTER 1

GENERAL INTRODUCTION

1. THE RATIONALE FOR REFORM AND GENERAL RECOMMENDATIONS

In undertaking this study of the liability of the Crown,[1] the Commission had three general objectives in view:

(1) to make the law fairer to both Crown and citizen;

(2) to bring the law into conformity with the general principles underlying the *Canadian Charter of Rights and Freedoms*,[2] and

(3) to simplify the law.

As we shall discuss throughout this report, the law of Crown liability in Ontario was the subject of major reform in 1963, when the *Proceedings Against the Crown Act*[3] made the Crown subject, for the most part, to the same law as an ordinary person. However, despite these extensive reforms, various anomalous Crown privileges and immunities remain, largely as holdovers from medieval conceptions of monarchy. As succeeding chapters will show, the Commission regards these residual privileges and immunities to be unjustified. Four general examples help illustrate our concerns.

First, the Crown remains immune from the remedies of injunction, specific performance and mandamus.[4] The courts have struggled to find ways of avoiding these immunities, sometimes granting an inappropriate remedy, and sometimes granting a remedy against an individual public servant instead of the Crown itself. Even where an appropriate remedy is available against the Crown, a party in a lawsuit with the Crown may face a

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[1] The meaning of the term "Crown" is discussed in the following section of this chapter, and *infra*, ch. 8. See, generally, Hogg, *Constitutional Law of Canada* (2d ed., 1985), at 215-17.

[2] Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.) as am. by the Constitution Amendment Proclamation, 1983, SI/84-102.

[3] S.O. 1962-63, c. 109, now R.S.O. 1980, c. 393.

[4] Remedies are discussed *infra*, ch. 4.

number of significant procedural barriers. Full rights of discovery are unavailable and there are many special limitation periods and notice requirements that confer privileged status on the Crown.[5]

Secondly, the Crown continues to enjoy certain residual immunities from the general law of torts.[6] As a result, a person injured by the wrongful act of the government will not necessarily have the same rights as would be available against a private wrongdoer.

Thirdly, in certain cases, the Crown has the power to escape from its contractual obligations without compensating the private contracting party.[7] This power introduces a risk to contracting with the Crown that is absent from other contracts.

Finally, as we shall see, the Crown is not generally bound by statutes.[8] The resulting wide area of Crown immunity has given rise to an extraordinarily complicated body of case law, in which the courts have tried to find that the Crown is bound by statutes in the face of the general rule of immunity.[9]

These immunities are simply examples of numerous advantages enjoyed by the Crown in its dealings with ordinary persons that can occasionally work injustice. These privileges and immunities also result in anomalous and unnecessary complications in the law, and create legal hazards to persons dealing with the Crown.

In our view, the present law governing liability of the Crown, insofar as it still provides privileges and immunities not enjoyed by ordinary persons, is opposed to popular and widely-held conceptions of government. We share a deeply-held notion that the government and its officials ought to be subject to the same legal rules as private individuals and, in particular,

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[5] Procedural and other related matters are discussed *infra*, ch. 5.

[6] The Crown's liability in tort is discussed *infra*, ch. 2.

[7] The Crown's liability in contract is discussed *infra*, ch. 3.

[8] The Crown's liability under statute is discussed *infra*, ch. 7.

[9] The Crown's immunity from statutes was recently criticized by Dickson J. (now C.J.) in *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, 50 N.R. 120 (subsequent reference is to [1983] 2 S.C.R.), in which the Supreme Court of Canada reluctantly decided that federal Crown corporations that were alleged to have participated in a price-fixing cartel were not bound by the *Combines Investigation Act*, R.S.C. 1970, c. C-23. Dickson J. said of the immunity, at 558:

> It seems to conflict with basic notions of equality before the law. The more active government becomes in activities that had once been the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject.

should be accountable to injured citizens for unauthorized action.[10] This is a notion that lies at the heart of the "rule of Law" and of "constitutionalism" as those concepts have been conventionally understood in the common law world. An important, if not central, aspect of this concept is the fact that the application of ordinary principles of law to government is placed in the hands of the ordinary courts. The courts are perceived to be independent of government and therefore capable of being relied upon to award an appropriate remedy to a person who has been injured by illegal government action.[11] These longstanding constitutional notions of the rights of individuals *vis-à-vis* the state have been most recently exemplified, and immeasurably strengthened, by the passage of the *Canadian Charter of Rights and Freedoms*,[12] and by the broad and purposive approach that the Supreme Court of Canada has adopted in its interpretation.[13] The Charter is, in that broad sense, the philosophical backdrop against which the reform proposals in this report are made.

To assert that the government and its servants should be subject to the ordinary law is not to deny altogether that the Crown requires some unique powers and immunities in order to govern effectively. This is unarguably the case, as is recognized throughout this report. However, a long and powerful tradition requires that the scope of such powers and immunities should be carefully defined, and should be no broader than is necessary to fulfill the particular policy and purpose for which they have been granted. The problem is that the present law of Crown liability is a hodge podge of rules, presumptions, privileges and immunities, largely based on an anachronistic historical rationale, rather than a rational and carefully designed set of rules appropriate to contemporary notions of government and citizen rights.

In determining the nature and scope of reform proposals in this area, the Commission has considered whether reform of Crown liability might be modelled on European legal systems where there is a separate regime of public law administered by special administrative courts. Some commentators have concluded that these systems generally succeed in controlling government and compensating losses at least as well as the British-

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[10] This liberal conception of government has been described by Dicey as the "idea of equality": Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., 1965), at 193.

[11] This is the ideal picture that led Dicey to make his famous boast that "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen", *ibid*.

[12] *Supra*, note 2.

[13] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161; and *Regina v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321.

derived systems.[14] However, no matter how effectively such systems work in their particular national contexts, the question for us is whether such a regime of public law could be successfully transplanted to Canada. In our view it could not, for a number of reasons. As we have indicated, the idea that the Crown should be subject to the same law as ordinary persons captures a fundamental attitude towards government that would make it very difficult for any special regime of public law to achieve the popular legitimacy that is indispensable to any successful law reform.

Moreover, the establishment of a new regime of public law of governmental liability would raise a number of difficult boundary issues to settle.[15] A preliminary question would be: to whom should the new regime apply? Obviously, it would apply to the Crown, meaning the activities undertaken by the central ministries or departments of the government. However, would these separate legal principles also govern the personal liability of individual Crown servants, or public bodies that are "Crown agents"? Decisions would also have to be made about the inclusion in such a regime of the various public bodies, such as municipalities and school boards that are not Crown agents, and of private individuals and firms that are acting as contractors to the Crown or to other public bodies. And even if appropriate decisions could be arrived at about who should be governed by this regime of public law, further arguments would arise about what activities should be governed. For example, one view might be that a new regime should exclude activities that have a close analogy to the activity of private persons, such as driving a vehicle or constructing a building.

It might be argued that determinations of this kind, although difficult, are not new, and that similar decisions must be made from time to time under the existing regime. However, such distinctions rarely carry the consequence of changing the entire applicable body of law. It seems inevitable that such a wholesale change would give rise to much wasteful litigation as parties seek to position themselves within whichever regime is most favourable to their success.

Further complications would arise from the fact that much litigation to which the Crown is a party involves multiple parties, as well as multiple legal issues. A plane crash, for example, could raise issues of air traffic control (Crown), airport maintenance (Crown or municipality or private owner), pilot error (employee of Air Canada or private airline) and aircraft construction (private manufacturer). If the legal principles that applied to the "public" parties were different from those that applied to the "private" parties, complications and difficulties in the resolution of substantive issues would be unavoidable.

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[14] See, for example, Jennings, *The Law and the Constitution* (5th ed., 1959), at 230-38. But see Harlow, *Compensation and Government Torts* (1982), at 102-06, who does not share this enthusiasm for the French system.

[15] See, generally, Hogg, *Liability of the Crown* (2d ed., 1989) (hereinafter referred to as "Hogg II"), at 113-19.

Jurisdictional issues would also almost certainly arise. A new regime of governmental liability based on the European model would probably be administered by a special "administrative court", separate from the conventional court system. Experience with the Federal Court of Canada tells us that a dual court system leads to costly and time consuming litigation over jurisdiction, and occasionally makes it impossible to fully resolve disputes that involve multiple parties and legal issues.[16]

The Commission has concluded that the application of the ordinary law by the ordinary courts to the activities of government not only conforms to a widely-held political ideal but also preserves us from many practical problems. Moreover, as our discussion below will indicate, the existing system appears to have made a reasonably successful accommodation to certain admittedly unique elements of governmental activity. In our view, the case for retention of the ordinary principles of common law to govern issues concerning the liability of the Crown is overwhelming.

We should indicate that, because the legal position of the Crown is already largely the same as any private person, the changes recommended in this report are neither radical nor sweeping. Rather, the Commission's recommendations would essentially complete the reforms undertaken some time ago, by eliminating a residue of procedural and substantive privileges that have lingered on without justification.

Nevertheless, one may well ask: why would a government want to strip itself of advantages that it now enjoys? One natural response in this era of the *Canadian Charter of Rights and Freedoms*[17] is that such reform is necessary in order to make the law of Crown liability consistent with the requirements of the "supreme law of Canada".[18] However, it is as yet unclear whether any, and if so which, of the existing immunities and privileges of the Crown will withstand scrutiny in light of the Charter.[19] And while many of the principles and arguments that guide Charter interpretation are clearly relevant and persuasive when considering issues of liability of the

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[16] Hogg, *supra*, note 1, at 142-48.

[17] *Supra*, note 2.

[18] *Ibid.*, s. 52(1).

[19] For example, an argument that it is a denial of equal protection under s. 15 of the Charter to treat a person injured by a public authority differently from other injured persons has had mixed success: see *Kurolak v. Minister of Highways and Transportation* (1986), 28 D.L.R. (4th) 273, [1986] 4 W.W.R. 323 (Sask. Q.B.); *Streng v. Township of Winchester* (1986), 56 O.R. (2d) 649, 31 D.L.R. (4th) 734 (H.C.); *Re Wright and Attorney General for Canada* (1987), 62 O.R. (2d) 737, 46 D.L.R. (4th) 182 (Dist. Ct.); *Mirhadizadeh v. The Queen in Right of Ontario* (1986), 57 O.R. (2d) 441, 13 C.P.C. (2d) 1 (H.C.); *Rosati v. City of Niagara Falls* (1987), 60 O.R. (2d) 474, 19 C.P.C. (2d) 99 (Dist. Ct.); and *Colangelo v. City of Mississauga* (1988), 66 O.R. (2d) 29, 53 D.L.R. (4th) 283 (C.A.), leave to appeal to S.C.C. pending. See, also, Jack, "Suing the Crown and the Application of the Charter" (1986), 7 Advocates' Q. 277.

Crown, the reforms that we propose in this report do not depend primarily, or even necessarily, on a Charter argument.

In our view, the answer to the question why the government should relinquish many of the advantages that it now enjoys is very simple, yet compelling. It is the right and fair thing for good government to do. It is the same reason that animated the original reforms of the *Proceedings Against the Crown Act*[20] in 1963, and more recent legislation such as the *Freedom of Information and Protection of Privacy Act*.[21] The preservation of the Crown's minor tactical advantages in its dealings with ordinary persons would be a trivial and unworthy reason to set against the improvement in the justice of our legal system that this report proposes.

Therefore, we recommend that a new *Crown Liability Act* should be enacted to implement the reform proposals made in this report.[22] As we shall see, detailed recommendations are made in the context of the particular area of law dealt with in each succeeding chapter. However, at this point we think it is important to indicate that, as a matter of general principle, we believe that the Crown should be subject to the same law as any other person, and that any exception to this general rule must be clearly justified. Accordingly, our general and central recommendation is that the privileges of the Crown in respect of civil liabilities and civil proceedings should be abolished, and the Crown and its servants and agents should be subject to all the civil liabilities and rules of procedure that are applicable to other persons who are of full age and capacity.[23] The specific implications of this general recommendation, and certain limited exceptions to it, are canvassed in each chapter that follows. However, we wish to emphasize that this recommendation is intended to apply with respect to all causes of action, including tort, contract, restitution and breach of trust.[24]

There is one final general matter that should be addressed before turning to consider the definition of the Crown. Throughout the balance of this report, we make numerous recommendations for the amendment or repeal of specific statutory provisions relating to Crown liability. We recognize that other, yet to be identified, statutory amendments may be required in order to complete the reforms contemplated by this report. However, it would be difficult, if not impossible, to identify all possible

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[20] *Supra*, note 3.

[21] S.O. 1987, c. 25.

[22] See *infra*, Appendix 1 (hereinafter referred to as the "draft Act"). The draft Act also includes certain provisions from the present *Proceedings Against the Crown Act* that did not raise any reform issues and, consequently, were not dealt with in this report. In the draft Act, these provisions are marked by an asterisk and are included without substantive modification.

[23] *Ibid.*, s. 2(1).

[24] *Ibid.*, s. 2(2)(b).

consequential amendments without an intimate knowledge of all Ontario statutes. In our view, the best way to ensure that all necessary changes are identified and implemented would be to give the responsibility for reviewing legislation to each ministry responsibile for the particular statute, and we so recommend.

2. DEFINITION OF THE "CROWN"

At its simplest, the "Crown" means "the government", and for the purpose of this report refers to the Government of Ontario. However, the term "Crown" is somewhat misleading in that the Queen and her representative in Ontario, the Lieutenant Governor, rarely play more than a formal role in governing the province. Executive power is actually exercised by the Premier and the other ministers who direct the work of the civil servants in the ministries of the provincial government. Nevertheless, the usual legal term for the executive branch of the government is the "Crown".

However, the question—what constitutes the "government" for the purpose of Crown liability—itself requires clarification. Many public persons or bodies that the lay person might naturally consider to be part of government are not considered to be so in this context. For example, although many would regard judges as public officials in the broadest sense of the term, judges are not part of the government for the purpose of legal liability of the Crown. Similarly, while certain public bodies, such as rights deciding tribunals, are looked upon by most people as an arm of government, those bodies are very often independent entities whose liabilities are quite separate from the Crown. The factor that determines whether a person or body is considered to be included in the definition of the Crown is the degree to which that person or body is subject to the control of a minister or the Cabinet. This question is discussed more fully below in Chapter 8.

Before proceeding to consider the historical development of Crown liability, we should indicate that this report discusses the liability of both the Crown and its servants or agents. We shall see that the Crown can be directly liable to an injured person for its own conduct. However, because the Crown, like a corporation, generally acts through its servants, the liability of the Crown most commonly arises vicariously. Moreover, the acts of Crown servants or agents may also give rise to personal liability on the part of the servant.

We now turn to discuss generally the historical development of the present law of liability of the Crown.

3. HISTORICAL DEVELOPMENT OF CROWN LIABILITY

(a) Petition of Right

In England in the middle ages there was no formal procedure for suing the Crown.[25] The only recourse for a person seeking redress of a wrong committed by the central government was to petition the King. A petition that asserted a legal right against the Crown came to be called a "petition of right". If the King gave his consent, and endorsed the petition "fiat justitiae"—let right be done—, the matter could be tried in the ordinary courts. However, if the King refused his consent, the Crown could not be sued. After the development of responsible government in the mid-nineteenth century, the King's discretion to grant the "royal fiat" became the discretion of the government of the day.

Besides the obvious deficiency that the petition of right was a matter of grace of the Crown, another fundamental deficiency was that it did not permit the Crown to be sued in tort. This significant immunity developed in the middle of the nineteenth century, based on the reasoning that attribution of tortious liability to the King would violate the maxim "the King can do no wrong".[26]

A further deficiency in the petition of right was that, even where substantive legal rights could be asserted against the Crown by the petitioner,[27] the full range of remedies and procedures was not available to the petitioner. In particular, because the courts would not order the King to perform a specific act, injunction, specific performance, mandamus, and discovery were not available in any proceeding against the Crown.[28]

(b) Reception in Canada

The law of Crown liability migrated to British North America with the rest of the public law of England,[29] and the petition of right became the procedure for suing the colonial governments. With the advent of responsible government, each colonial government enjoyed the privilege of granting or denying the royal fiat when faced with a lawsuit. Each colonial government also became immune from liability in tort, and from the coercive remedies of injunction, specific performance, mandamus, and discovery. Upon Confederation in 1867, the Crown in right of Canada, and the

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[25] For a detailed history of proceedings against the Crown, see Hogg II, *supra*, note 15, at 3-7.

[26] *Ibid.*, at 5.

[27] As will be discussed *infra*, ch. 3, property and contract claims could be pursued by the petition of right.

[28] Remedies against the Crown are discussed *infra*, ch. 4.

[29] For a discussion of the reception of English law into Canada and Ontario, see, generally, Hogg, *supra*, note 1, ch. 2.

Crown in the right of each province, came to enjoy the same privileges and immunities as the Crown in right of the United Kingdom.

(c) Reform in the United Kingdom

After the second world war, public opinion in the United Kingdom finally became aroused against certain obvious injustices arising from Crown immunities and privileges, and particularly by the inability of injured plaintiffs to sue the government in tort.[30] This change in public opinion led to the reform of the law of Crown liability in the United Kingdom. The *Crown Proceedings Act, 1947*[31] abolished the petition of right, replacing it for the most part with the procedure that would be available between subject and subject.[32] The requirement of the Crown's fiat was also abolished, enabling the Crown to be sued without its consent.[33] Furthermore, the Crown's immunity in tort was abolished,[34] although some vestiges of immunity remained, and the Crown became liable to give discovery.[35] However, the Crown's immunity from injunction and specific performance was expressly retained.[36]

(d) Canadian Reform

The enactment in the United Kingdom of the *Crown Proceedings Act, 1947* became the spur to reform in Canada. In 1950, the Conference of Commissioners on Uniformity of Legislation in Canada prepared a Uniform Model Act[37] based on the United Kingdom Act. Between 1951 and 1974, the Model Act was enacted in substance by all of the Canadian provinces, except Quebec.[38]

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[30] Williams, *Crown Proceedings* (1948), at 17-19, and Hogg II, *supra*, note 15, at 83.

[31] 11 Geo. 6, c. 44. For an analysis, see Williams, *supra*, note 30, at 17-19; Street, *Governmental Liability* (1953), Ch. II, and Hogg II, *supra*, note 15, at 83.

[32] *Supra*, note 31, s. 1.

[33] *Ibid.*, s. 1.

[34] *Ibid.*, s. 2.

[35] *Ibid.*, s. 28.

[36] *Ibid.*, s. 21.

[37] Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of 1950*, at 76.

[38] Quebec did not adopt the Model Act, probably because its existing legislation had turned out to be more satisfactory than that of the other provinces, but it did abolish the requirement of the fiat in 1965: see Code of Procedure, S.Q. 1965, c. 80, as am. by S.Q. 1966, c. 21, s. 5, repealing arts. 1011-1024 of the Code of Civil Procedure and replacing them by arts. 94-94k (now R.S.Q. 1977, c. C-25, ss. 94-94.10). The reason the need for reform was less urgent in Quebec was that the Crown in right of Quebec had been held liable in tort, while, as indicated, the Crown was immune from liability in tort in the other provinces.

In Ontario, the *Proceedings Against the Crown Act* was enacted in 1963,[39] following the Uniform Model Act of 1950. The petition of right and the requirement of the fiat have been abolished.[40] The Crown may be sued in the courts by the procedure that would be appropriate between private parties.[41] The defendant in such proceedings against the Crown is to be described as "Her Majesty the Queen in right of Ontario".[42] As in the United Kingdom, while most of the Crown's immunity in tort have been abolished,[43] the Crown remains immune from injunction and specific performance.[44] Moreover, under the Ontario Act, the Crown is not fully liable to give discovery, and is entitled to refuse to produce a document or answer a question on the ground "that the production or answer would be injurious to the public interest".[45]

Against this historical background, we proceed to consider the liability of the Crown in more detail.

Recommendations

The Commission makes the following recommendations:

1. A new *Crown Liability Act* should be enacted to include the reform proposals made in this report.

2. The privileges of the Crown in respect of civil liabilities and civil proceedings should be abolished, and the Crown and its servants and agents should be subject to all the civil liabilities and rules of procedure that are applicable to other persons who are of full age and capacity.

3. Recommendation 2 should apply with respect to all causes of action, including tort, contract, restitution and breach of trust.

4. The responsibility for reviewing legislation, with an eye to identifying consequential amendments not specifically recommended in this report, should be left to each ministry responsible for the particular legislation.

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[39] S.O. 1962-63, c. 109, now R.S.O. 1980, c. 393.

[40] *Ibid.*, s. 3.

[41] *Ibid.*, ss. 8-10 and 17.

[42] *Ibid.*, s. 13.

[43] *Ibid.*, s. 5.

[44] *Ibid.*, s. 18.

[45] *Ibid.*, s. 12.

CHAPTER 2

TORT

1. PRESENT LAW

(a) INTRODUCTION

(i) The General Rule: Ordinary Tort Principles Apply

As we have discussed, the Crown is immune from liability in tort at common law. However, as a result of the reforms implemented by the *Proceedings Against the Crown Act*,[1] the Crown in Ontario is, for the most part, liable in tort in the same manner as any other person. As a general rule, ordinary principles of tort law govern the Crown's liability in tort and there is no "public law" of torts as such in Ontario.

Section 5 of Ontario's *Proceedings Against the Crown Act* makes the Crown subject to those "liabilities in tort to which, if it were a person of full age and capacity, it would be subject", in respect of four enumerated heads of liability. Section 17 of the Act provides that, "in proceedings against the Crown, the rights of the parties are as nearly as possible the same as in a suit between persons". The net effect of these provisions is that, so far as possible, the same rules of tortious liability are to be applied to the Crown as are applied to private persons. Therefore, the Crown is liable in tort only under recognized heads of liability.

The rule that the Crown and its servants are liable in tort only under recognized heads of tortious liability has this consequence: an invalid or *ultra vires* act by the Crown does not give rise to liability unless the act is a tort, even if a person suffers injury or loss as a result of that invalid act.

This point is illustrated by *James v. Commonwealth*,[2] an Australian case in which James, a packer of dried fruits, sued the Commonwealth for damages for the seizure of his dried fruit. James also claimed damages for "the general loss to his trade or business caused by the continual effect of the administration of the Dried Fruits Act and the regulations". The statute under which the seizure was made was held to be unconstitutional. James

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[1] R.S.O. 1980, c. 393.

[2] (1939), 62 C.L.R. 339 (H.C. Aust.).

succeeded in his first claim because he was able to show that the seizure was *ultra vires* and that the seizure constituted the tort of conversion. However, James failed in his second claim because the hindrance to his business, although unauthorized and clearly giving rise to damages, did not fall within a recognized head of tortious liability.[3]

However, an invalid decision that directly causes injury may give rise to a cause of action in tort if the invalid decision was made negligently or deliberately. In the former case, the tort would be negligence. In the latter case, the tort would be misfeasance in public office, which we shall discuss in the following section.

(ii) Principles of Tort Law Uniquely Relevant to Crown Activity

Although ordinary tort principles generally govern the liability of the Crown, the unique nature of the public process of governance, particularly with respect to responsibility for public policy making and the exercise of discretionary powers, has given rise to a number of tort principles that are relevant only to the Crown. We turn briefly to consider two of these developments.

a. The Operational/Planning Distinction in Negligence

Negligence is the most important head of tortious liability of the Crown, and ordinary negligence principles apply to the Crown as to any other person. However, the liability of the Crown in negligence is limited by a distinction drawn by the courts between the planning level of government and the operational level of government.[4] Put most simply, at the planning level of government, where policy decisions are made as to the allocation of scarce governmental resources, there is no liability in the Crown for negligence. At the operational level of government, where significant policy choices are not usually involved, the Crown can be held liable in negligence unless that decision involved a considered policy decision.[5]

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[3] See, also, *Welbridge Holdings v. Metropolitan Corporation of Greater Winnipeg*, [1971] S.C.R. 957, at 967, [1972] 3 W.W.R. 433; *Dunlop v. Woollahra Municipal Council*, [1982] A.C. 158, at 171, [1981] 1 All E.R. 1202 (P.C., Aust.) (subsequent reference is to [1982] A.C.); and *The Queen v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9.

[4] *City of Kamloops v. Nielson*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641 (subsequent references are to [1984] 2 S.C.R.). The planning/operational distinction originated in the United States where it appears to have first been applied in *Dalehite v. United States*, 346 U.S. 15, 97 L. ed. 1427, (1953). See, also, *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122 (1955).

[5] In *Anns v. Merton London Borough Council*, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.), the House of Lords accepted the planning/operational distinction, but added

For example, the decision not to build a lighthouse would probably be considered a planning decision, and therefore would not be actionable. Once having built the lighthouse, the failure to keep the light burning, an operational decision, would give rise to liability, unless the failure was a result of a policy decision to apply limited resources elsewhere.[6]

These principles were adopted as part of Canadian law in *City of Kamloops v. Nielson*.[7] In that case, the Supreme Court of Canada held a municipality liable in negligence for its failure to enforce a breach of a building standards by-law that had been discovered by the municipality's building inspector. The inspector had issued a stop work order, but neither he nor the municipality had enforced it. The majority of the court held that the decision whether or not to enforce the by-law was made at the operational level; accordingly, the decision could give rise to a duty of care to affected homeowners. The court then considered whether the municipality was nonetheless immune from liability because the failure to enforce the by-law had been "a policy decision taken in the *bona fide* exercise of discretion".[8] The court in fact found that no such policy decision had been made. Since the municipality had not acted with reasonable care, it was liable for negligence.[9]

b. Misfeasance in a Public Office

Another aspect of tort liability unique to the Crown is the tort known as misfeasance in a public office. This tort may be regarded as the exception to the general rule that the common law does not recognize a special "public" law of torts; it can be committed only by a public officer, that is, a person exercising a statutory or prerogative power. It is, therefore, a basis of liability that is applicable only to government.

Misfeasance in a public office is committed where a public officer abuses her office.[10] Either malice or knowledge of invalidity must be present

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the gloss that an operational decision might be immune if it involved a considered policy decision.

[6] See *Indian Towing Co. v. United States*, *supra*, note 4.

[7] *Supra*, note 4.

[8] *Ibid.*, at 24.

[9] *Ibid.*

[10] The academic commentary is more voluminous than the cases: see Aranson and Whitmore, *Public Torts and Contracts* (1982), ch. 3; Harlow, *Compensation and Government Torts* (1982), at 58-68; Gould, "Damages as a Remedy in Administrative Law" (1972), 5 N.Z.U.L. Rev. 105; McBride, "Damages as a Remedy for Unlawful Administrative Action" (1979), 38 Camb. L.J. 323; Craig, "Compensation in Public Law" (1980), 96 L.Q. Rev. 413; Phegan, "Damages for Improper Exercise of Statutory Powers" (1980), 9 Sydney L. Rev. 93; and Evans, "Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office" (1982), 31 Int. & Comp. L.Q. 640. See,

to constitute the tort. The requirement of malice involves an intent to inflict injury on the plaintiff. The requisite knowledge would be the knowledge that the decision was invalid, and that the plaintiff would be injured.[11] For example, the tort was committed where a police officer ordered the proprietor of a hotel to close the premises for licensing violations; the police officer knew that he had no power to give such an order.[12] The tort was arguably committed where the Premier of Quebec ordered the cancellation of a restaurant's liquor licence, although the specific term "misfeasance in a public office" was not used in the case; the Premier was motivated by malice towards the proprietor of the restaurant.[13] The tort was committed where a minister purported to revoke an import licence that he knew he had no power to revoke, and that he knew would result in injury to the plaintiff's trade.[14]

(iii) Conclusions

Apart from these few, though important, distinctions and principles that have developed in response to the unique nature of Crown activity, the Crown is otherwise generally subject to the same kinds of tortious liability as any other person. In some cases, the Crown may be directly liable for the tort. However, because the Crown, like a corporation, generally acts through its servants or agents, liability of the Crown in tort arises most commonly on the basis of vicarious liability. As we shall see,[15] Crown servants are also subject to personal liability in tort.

While the statutory reforms of the *Proceedings Against the Crown Act*[16] abolished most of the immunities historically enjoyed by the Crown in tort, the drafting of that Act has left a number of residual immunities that continue to protect the Crown from liability to which it would be subject if it were an ordinary person. We turn now to consider the effect of the reforms of the *Proceedings Against the Crown Act*, and of certain related statutory immunities enjoyed by Crown servants.

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also, the comment of Diplock J., in *Dunlop v. Woollahra Municipal Council*, *supra*, note 3, at 210.

[11] *Bourgoin v. Ministry of Agriculture, Fisheries and Food*, [1986] Q.B. 716, [1985] 3 All E.R. 585, at 601 (C.A.).

[12] *Farrington v. Thomson*, [1959] V.R. 286 (S.C.).

[13] *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (subsequent reference is to [1959] S.C.R. 121). Technically, liability depended upon article 1053 of Quebec's Civil Code, but Rand J., at 139-42, clearly thought that liability would be the same under the common law.

[14] *Bourgoin v. Ministry of Agriculture, Fisheries and Food*, *supra*, note 11.

[15] *Infra*, this ch., sec. 1(c).

[16] *Supra*, note 1.

(b) Direct Liability of the Crown

As indicated, the immunity from tort liability historically enjoyed by the Crown at common law was largely abolished by section 5(1) of the *Proceedings Against the Crown Act*,[17] which provides as follows:

> 5.–(1) Except as otherwise provided in this Act, and notwithstanding section 11 of the *Interpretation Act*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject
>
> (a) in respect of a tort committed by any of its servants or agents;
>
> (b) in respect of a breach of the duties that a person owes to his servants or agents by reason of being their employer;
>
> (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
>
> (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

Section 5(1)(a) refers to *vicarious* liability of the Crown, which will be discussed below. Section 5(1)(b), (c) and (d) imposes *direct* liability for (1) breach of employers' duties, (2) breach of occupiers' duties and (3) breach of statutory duties.

(i) Employers' Duties

The first head of direct liability of the Ontario Crown is for breach of an employer's duties to employees. These are, in essence, the common law duties owed by an employer to employees to provide competent servants, a safe plant and a safe system of work. At common law, a breach of these duties provides an injured employee with a cause of action in negligence against the employer, whether or not the injured employee could establish that a fellow employee had committed a tort so as to make the employer vicariously liable. However, this provision is currently of little practical significance in Ontario due to the provisions of the *Worker's Compensation*

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[17] The Ontario Act and its seven provincial counterparts follow s. 5 of the Uniform Model Act of 1950: see, generally, *supra*, ch. 1, secs. 3(c) and (d). In Quebec, no reforming statute was necessary to impose tortious (delictual) liability on the Crown, because Quebec's Code of Civil Procedure had long ago accomplished that result. Tortious (delictual) liability in Quebec continues to depend upon the general language of what is now art. 94 of the Code of Civil Procedure: see *supra*, ch. 1, note 38.

Section 2(c) of the British Columbia *Crown Proceedings Act*, R.S.B.C. 1979, c. 86, simply provides that "the Crown is subject to all those liabilities to which it would be liable if it were a person". This general language means that the Crown in right of British Columbia is subject to the full range of tortious liability, direct as well as vicarious.

Act,[18] which bars a tort action by an employee against the employer in respect of injuries covered by workers' compensation. This statutory bar effectively repeals the duties of care that an employer owed to her employees at common law.

(ii) Owner and Occupier's Duties

The second head of direct liability of the Crown under section 5(1) is for breach of an owner or occupier's duties, which encompass the duties of care owed by an owner or occupier of property to persons entering the property. Breach of these duties provides an injured visitor with a cause of action against the owner or occupier of the land, even if the immediate cause of the accident was the act or omission of an employee of the occupier.

However, this head of direct liability is subject to section 5(5) of the Act which provides:

> 5.–(5) Where property vests in the Crown independent of the acts or the intentions of the Crown, the Crown is not, by virtue of this Act, subject to liability in tort by reason only of the property being so vested; but this subsection does not affect the liability of the Crown under this Act in respect of any period after the Crown, or any servant of the Crown, has in fact taken possession or control of the property.

Section 5(5) creates an immunity from tortious liability where property vests in the Crown by operation of law, without its act or intention.

(iii) Statutory Duties

The third head of direct liability is for breach of statutory duty. As a separate head of tortious liability, breach of a statutory duty has a very narrow scope in Canada.[19] In *The Queen v. Saskatchewan Wheat Pool*,[20] the Supreme Court of Canada held that the civil consequences of breach of a penal statute is subsumed by the law of negligence; proof of breach of a statute would be relevant only as evidence of negligence. In some cases, the statute should be treated as substituting a more specific rule for the

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[18] R.S.O. 1980, c. 539, s. 8. See, generally, Ison, *Workers' Compensation in Canada* (2d ed., 1989), at 163.

[19] Courts have often been willing to grant a civil remedy to a person injured by breach of a penal statute, but a debate has raged on the theoretical basis of the civil remedy. The view that is dominant in the United Kingdom, New Zealand and Australia is that the civil liability is imposed by the statute; this view recognizes, in effect, a separate nominate tort of breach of statutory duty. The view that is dominant in the United States is that the civil liability is imposed by the common law; this view treats a breach of statutory duty as a branch of the tort of negligence.

[20] *Supra*, note 3.

common law standard of reasonableness. The effect of the *Saskatchewan Wheat Pool* case is that breach of statutory duty encompasses only those statutes that expressly confer a civil right of action for their breach.

Where a statute confers a private right of action on a person injured through a breach of a duty imposed by the statute, it remains a separate question whether such an action may be brought against the Crown. As we discuss below, such a duty binds the Crown only if the statute makes clear by express words or necessary implication that it does bind the Crown.[21] Where a statute binds the Crown and confers a private right of action for breach of a duty imposed by the statute, the Crown will be liable in damages to a plaintiff who has been injured by a failure to perform the duty. In such a case, section 5(1)(d) adds little if anything to the issue of the Crown's liability. The Crown's liability would derive from the statute imposing the duty; no provision in Crown proceedings legislation would be necessary to make the Crown liable.

(iv) Other Heads of Direct Liability of the Crown

In Ontario, it is clear that the three heads of direct liability of the Crown enumerated in section 5(1) of the *Proceedings Against the Crown Act*, are exhaustive. The problem is that this section leaves open the possibility that some injured persons in Ontario may be left without legal redress. While the three heads set out in section 5(1) are without doubt the most important categories of the Crown's direct liability in tort, a public body may owe a duty of care with respect to actions that would not fall within one of the enumerated heads of direct liability nor involve any vicarious liability. Some examples from other jurisdictions help illustrate this point.

In England, a school authority has been held directly liable for not exercising proper care and supervision in allowing a small child to stray onto a busy street where the child caused an accident.[22] And a hospital has been held directly liable for the death of a patient caused by lack of a proper system of drug administration.[23] In New Zealand, the Crown that controlled and managed a harbour has been held directly liable for failure to remove a snag in the harbour.[24] In each of these cases no tort had been committed by a servant, so that there was no vicarious liability. In each case, the liability was direct, but did not fit within any of the three categories

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[21] The question of statutes binding the Crown is considered, *infra*, ch. 7.

[22] *Carmarthenshire County Council v. Lewis*, [1955] A.C. 549, [1955] 1 All E.R. 565 (H.L.). In the Court of Appeal the authority was held vicariously liable for the negligence of a teacher. However, the House of Lords, while affirming liability, exonerated the teacher.

[23] *Collins v. Hertfordshire County Council*, [1947] K.B. 598, [1947] 1 All E.R. 633. It was held that vicarious liability for the negligence of the authority's servants was a possible but separate head of liability.

[24] *R. v. Williams* (1884), 9 App. Cas. 418 (P.C., N.Z.).

of liability listed in the *Proceedings Against the Crown Act*. If the Ontario Crown had been the defendant in the cases described above, it could have been held to be free from liability, and the injured parties left without legal recourse.

(c) Personal Liability of Crown Servants

(i) Common Law

The personal liability of Crown servants for torts committed by them has always been a feature of the common law; indeed, Dicey regarded it as one of the tenets of his "rule of law".[25] As a general rule, when a Crown servant commits a tort, the servant is personally liable; if the tort is committed in the course of employment, the Crown is vicariously liable as well.[26] Two exceptions to this general rule of personal liability of Crown servants, relating to judicial and quasi-judicial decision-makers, are discussed below.[27]

(ii) The Effect of Legal Authority for Actions of Crown Servants

Government would be impossible if the Crown and its servants were placed in all respects on an equal footing with private persons. Encroachment on private rights is sometimes necessary in order to govern fairly and effectively. Government inspectors, for example, must sometimes enter privately owned property without the permission of the owner. Without the cloak of legal authority, such an act would be a trespass. However, legal authority is a defence to a tort action against both the Crown and a Crown servant. Acts of Crown servants that are authorized by statute or Crown prerogative cannot be tortious.

Not surprisingly though, there can often be doubt whether a statutory power or duty in fact authorizes the commission of an act that otherwise would be tortious. Where a statutory power relied upon by the Crown servant is determined not to provide enough authority, the resulting decision or act will be *ultra vires* and therefore invalid. An invalid act or decision will not afford a defence to a tort action, whether it is brought against the official who made the decision or the officials who are charged with enforcing it.[28] As a result, an official, who honestly believed on reasonable grounds that he was acting pursuant to legal authority, could be held personally liable in tort. Similarly, where tortious acts are committed under

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[25] Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., 1965).

[26] Vicarious liability is discussed *infra*, this ch., sec. 1(d).

[27] *Infra*, this ch., sec. 1(c)(iv).

[28] Rubinstein, *Jurisdiction and Illegality* (1965), ch. 6.

the authority of a statute that is subsequently held to be unconstitutional, the officials whose duty it was to enforce the statute will be personally liable for any tortious acts committed under its provisions, even though they honestly believed on reasonable grounds that the statute was valid. An invalid statute cannot clothe their acts with the required legal authority.[29]

(iii) Statutory Immunity Clauses Protecting Crown Servants

In Ontario, many statutes establishing Ministries or other agencies of the government include a standard immunity or privative clause that immunizes each employee from liability for damages "for any act done in good faith in the execution or intended execution of his duty or for any alleged neglect or default in good faith of his duty".[30] Many of these clauses preserve the vicarious liability of the Crown itself for any act that would have been tortious but for the privative clause.[31] However, others do not preserve the Crown's vicarious liability,[32] with the result that an injured person can occasionally go uncompensated.[33] Moreover, even where the Crown's vicarious liability is preserved, a plaintiff can encounter difficulty in proving her case, since discovery would be available only against the Crown and not against the Crown servant who enjoys the benefit of the statutory immunity.[34]

(iv) Judicial and Quasi-Judicial Immunity

Judges in Ontario enjoy absolute immunity from civil liability unless they knowingly act outside their jurisdiction. The principle of judicial immunity has been recently canvassed and reaffirmed by the Supreme Court of Canada in *Marshall v. MacKeigan*.[35] The policy underlying this rule is to

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[29] Pannam, "Tortious Liability for Acts Performed under an Unconstitutional Statute" (1966), 5 M.U.L. Rev. 113.

[30] See, for example, *Ministry of Community and Social Services Act*, R.S.O. 1980, c. 273, s. 4.

[31] *Ibid.*

[32] In the Commission's review of Ontario statutes, a total of 80 privative clauses were found. There are twenty-two statutes establishing Ministries and thirteen of them include privative clauses on this standard model: see, for example, *Ministry of Consumer and Commercial Relations Act*, R.S.O. 1980, c. 274, s. 8.

[33] *Infra*, this ch., sec. 1(d), and the *Proceedings Against the Crown Act*, *supra*, note 1, s. 5(2).

[34] For a discussion of discovery of the Crown, see *infra*, ch. 5, sec. 3(a).

[35] Unreported, (October 5, 1989). The immunity of superior court judges is also discussed in *Morier v. Rivard*, [1985] 2 S.C.R. 617, and *Roger v. Mignault* (1988), 13 Q.A.C 42. All other judges, including masters, in Ontario enjoy the same immunity as superior court judges by virtue of s. 98 of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11.

ensure that a judge is "free in thought and independent in judgment",[36] which would be impossible if the judge were liable to be "harassed by vexatious actions".[37]

There appears to be no reported instance of a judge of a superior court being held liable in damages for a tort knowingly committed outside her jurisdiction.[38] The absence of case law on this point may be explained by the fact that the jurisdiction of a superior court is so broad that only the most exceptionally arbitrary act could expose the judge to liability. Even in the case of inferior courts, findings of judicial liability in tort are not common.[39]

The immunity of quasi-judicial decision makers is more limited than that of judges. At common law, such decision makers are protected from liability in tort only if they are acting *bona fides* and within jurisdiction.[40] Moreover, the statutory immunity enjoyed by quasi-judicial decision makers is also generally subject to the requirements of *bona fides* and jurisdiction.[41] Given that the notion of jurisdiction in the administrative law context is a notoriously difficult and malleable one, the present immunity of quasi-judicial decision makers is subject to a fair degree of uncertainty.[42]

On judicial immunity, see Rubinstein, *supra*, note 28, at 127-49; Brazier, "Judicial Immunity and the Independence of the Judiciary", [1976] Pub. L. 397; Sadler, "Judicial and Quasi-judicial Immunities: A Remedy Denied" (1982), 13 M.U.L. Rev. 508; Aranson and Whitmore, *supra*, note 10, at 138-47; Glenn, "La Responsabilité des Juges" (1983), 28 McGill L.J. 228; and Feldthusen, "Judicial Immunity: In Search of an Appropriate Limiting Formula" (1980), 19 U.N.B.L.J. 73.

[36] *Garnett v. Ferrand* (1827), 6 B. & C. 611, 108 E.R. 576, at 581 (K.B.).

[37] *Fray v. Blackburn* (1863), 3 B. & S. 576, 122 E.R. 217, at 217 (Q.B.).

[38] Sadler, *supra*, note 35, at 310.

[39] Examples of liability are the *Case of the Marshalsea* (1612), 10 Co. Rep. 68b, 77 E.R. 1027 (K.B.); *Houlden v. Smith* (1850), 14 Q.B. 841, 117 E.R. 323; and *In re McC.*, [1985] 1 A.C. 528, [1984] 3 All E.R. 908 (H.L.).

[40] *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg*, *supra*, note 3, 22 D.L.R. (3d) 470, and *Calvert v. Law Society of Upper Canada* (1981), 32 O.R. (2d) 176, 121 D.L.R. (3d) 169 (H.C.J.).

[41] See, for example, the *Public Authorities Protection Act*, R.S.O. 1980, c. 406, s. 2, which protects any person authorized to hear or determine any argument from liability "with respect to any matter within his jurisdiction, unless the act was done maliciously and without reasonable and probable cause".

[42] In Ontario, the immunity of judges from liability in tort had been extended to Crown prosecutors: *Nelles v. The Queen in Right of Ontario* (1985), 51 O.R. (2d) 513, 21 D.L.R. (4th) 103 (C.A.). However, the Supreme Court of Canada recently reversed that decision: *Nelles v. The Queen in Right of Ontario* (1989), 69 O.R. 2d 448.

(d) Vicarious Liability of the Crown

As a general rule at common law, a master or employer is vicariously liable for a tort committed by her servant or employee in the course of employment.[43] However, prior to the reforms initiated by the United Kingdom in 1947, and subsequently adopted in Ontario, the Crown was immune from vicarious liability in tort. As we have discussed, section 5(1)(a) of the *Proceedings Against the Crown Act* now imposes vicarious liability on the Crown "in respect of a tort committed by any of its servants or agents".[44] Section 5(2) provides, however, that no proceedings may be brought against the Crown unless proceedings in tort may be brought against the Crown servant or agent. Moreover, section 5(4) provides that an enactment that negatives or limits the liability in tort of a Crown servant also negatives or limits the liability of the Crown. Accordingly, an immunity clause that protects a Crown servant without expressly preserving the vicarious liability of the Crown will also immunize the Crown.

A Crown "servant" is defined by the same rules as are used by the common law to identify private servants;[45] the control test and its many variants supply the governing principles.[46] "Servant" is defined in section 1(e) of the *Proceedings Against the Crown Act* as including "a minister of the Crown". "Agent" is defined in section 1(a) as including "an independent contractor employed by the Crown". Section 2(2)(c) stipulates

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[43] See, generally, Atiyah, *Vicarious Liability in the Law of Torts* (1967), chs. 3-8.

[44] By contrast, in British Columbia and Quebec, the Crown's liability in tort depends upon a general legislative provision that makes the Crown subject to the same legal liabilities as a private person, including vicarious liability for the torts of its servants: see *supra*, note 17.

[45] Goldenberg, "Tort Actions Against the Crown in Ontario" in Special Lectures of the Law Society of Upper Canada, *New Developments in the Law of Torts* (1973), 341, at 373.

[46] See Atiyah, *supra*, note 43, chs. 3-8.

We should note, however, that one aspect of the Crown's vicarious liability is dependent on section 5(3) of the *Proceedings Against the Crown Act*, *supra*, note 1, which provides:

> 5.–(3) Where a function is conferred or imposed upon a servant of the Crown as such, either by a rule of the common law or by or under a statute, and that servant commits a tort in the course of performing or purporting to perform that function, the liability of the Crown in respect of the tort shall be such as it would have been if that function had been conferred or imposed by instructions lawfully given by the Crown.

This provision abolished an old and much criticized common law rule, known as the "independent discretion rule", which held that the Crown was not vicariously liable for a tort committed by a Crown servant while purporting to exercise a power or duty conferred by law directly on the Crown servant: see Hogg, *Liability of the Crown* (2d ed., 1989), at 94-96. We agree that this rule is unacceptable and this provision has been carried forward as s. 5(1) of the *Crown Liability Act*, *infra*, Appendix 1 (hereinafter referred to as the "draft Act") without modification.

that the Crown is not subject to proceedings under the Act unless the servant or agent "has been appointed by or is employed by the Crown."

At common law, vicarious liability flows from the torts of servants, and only rarely from the torts of agents (who are not servants) and independent contractors.[47] Therefore, the reference to "agents" and "independent contractors" in section 5(1)(a) of the *Proceedings Against the Crown Act* might be thought to expand the Crown's liability beyond that of a private employer. However, section 2(2)(a) of the Act expressly provides that nothing in the Act "subjects the Crown to greater liability in respect of the acts or omissions of a servant or agent of the Crown than that to which the Crown would be subject if it were a person of full age and capacity". Similarly, with respect to tortious liability generally, section 5(1) provides that the Crown is subject only to "those liabilities in tort to which, if it were a person of full age and capacity, it would be subject". Accordingly, the Crown's liability extends only to those agents and independent contractors whose employers would be liable vicariously at common law. The issue of vicarious liability of the Crown for the acts of Crown agents is discussed below in chapter 8.

2. CASE FOR REFORM AND RECOMMENDATIONS

(a) Introduction

As the foregoing discussion indicates, the reforms that were implemented in 1963 by the *Proceedings Against the Crown Act*[48] have largely succeeded in making the Crown subject to the same principles of liability in tort as any other person. Nevertheless, we have identified a number of residual Crown immunities that remain to be addressed. However, before turning to consider these issues, we wish to discuss briefly certain reform proposals that represent significant departures from the present rules governing liability of the Crown in tort, and explain why we have not recommended their adoption at this time.

(i) Compensation Based on Risk

It has been suggested[49] that the government should be liable for all unusual or exceptional losses suffered by individuals as a result of governmental activity, regardless of negligence or fault.[50] This idea not only rejects

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[47] Hogg, *supra*, note 46, at 31-33, 99-110, and 338-40.

[48] *Supra*, note 1.

[49] Harlow, *supra*, note 10, at 102-06, describes French law, although she does not advocate its adoption in the United Kingdom.

[50] Street, *Governmental Liability* (1953), at 78. See also Law Reform Commission of Canada, *The Legal Status of the Federal Administration* (1980), at 72-74.

fault as the basis for tortious liability, but it makes liability flow from valid or authorized, as well as invalid, governmental decisions.

The rationale for this scheme of strict "no fault" liability of the Crown is a risk theory: the risks of governmental activity should be borne by the whole community rather than by the individual who has been fortuitously harmed by the activity.[51] The argument in favour of this form of strict liability is based on the ability of government to spread the cost of its activity over the community at large.[52]

(ii) Compensation Based on Entitlement

An alternative proposal for reform of governmental liability in tort contemplates a scheme of liability based on a notion of "entitlement" to a public benefit.[53] According to this theory, many of the relationships between government and citizen are best analyzed in terms of entitlement, rather than in traditional tort terms. For example, a failure by a municipality to inspect a building, causing a defect to go undiscovered, could be analyzed, not in terms of negligence by the municipal inspectors (and, vicarously, the municipality), but rather as the denial of a benefit (inspection) to which the building owner is entitled.

Under such a reform proposal, where a person who has suffered loss from governmental action or inaction is able to establish that she had been denied some public benefit to which she was entitled, she would be entitled to either recover the withheld benefit or to receive damages for the loss. Once an entitlement has been established, governmental liability would be strict: the plaintiff would succeed without proof of negligence or other fault.

The theory of entitlement calls for a special regime of law to govern losses caused by government. The argument in favour of this scheme of Crown liability rejects the analogy between governmental activity and private activity, and is especially directed to the law of negligence. More specifically, it is argued that the distinction between planning and operational decisions is meaningless. Moreover, it is said that the courts lack the competence to establish and define appropriate duties of care for public bodies.

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[51] See Harlow, *supra*, note 10, at 70-78; Craig, *supra*, note 10, at 441-43. Both authors emphasize the great difficulty of constructing a regime of liability based on risk.

[52] A similar argument has prevailed in the industrial setting, where, under workers' compensation legislation, an employer's enterprise bears the cost of insuring against the risk of all the injuries to employees that are caused by the business. In some jurisdictions, the same idea has been applied to traffic accidents. In New Zealand, tort liability for all "personal injury by accident" has been replaced by comprehensive public insurance. See Fleming, *The Law of Torts* (7th ed., 1987), ch. 20.

[53] Cohen and Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986), 64 Can. B. Rev. 1.

(iii) Compensation Based on Invalidity

Another, though more limited, proposal of strict liability of the Crown for loss caused by government activity has also been made. As we have indicated, an invalid decision is actionable only if it is made negligently, or if it is tainted by malice or knowledge of its invalidity. A possible reform in the present law would be to require compensation for any invalid decision: anyone who had suffered loss as a result of an invalid governmental act would be entitled to be compensated.[54] For example, Mr. James would recover for the interruption to his business caused by the seizure of his dried fruit under an unconstitutional statute. [55]

Liability would no longer be based on fault, be it negligence, malice or knowledge of invalidity; rather, it would be a species of strict liability. As with the first proposal, the argument in favour of strict liability is based on the ability of the government to spread the loss over the tax-paying community. The individual who was directly injured by an invalid governmental act would not have to bear the cost.

(iv) Conclusions

The Commission has considered the foregoing proposals with interest and recognizes that there is some force to the arguments in favour of each. However, we are not prepared at this time to recommend their statutory implementation. Without entering into detailed analyses and explanations of concerns that may arise with respect to each proposal, suffice it to say that each raises a number of complex and difficult questions of definition, cost of implementation, and the appropriate roles of the courts and the legislature.[56]

In our view, the common law of torts has been reasonably successful in developing and adapting tort principles in ways that are appropriate to public sector activity by the Crown. For example, the operational/planning distinction in torts accommodates, in what we regard as a generally satisfactory manner, the essential policy-making role of government, while imposing a reasonable duty of care on the Crown and its servants in their day-to-day activities. Some of the various proposals outlined above will no doubt prevail in the market place of ideas, and may influence judicial decision-making and the evolution of the common law. We think it appropriate to allow for the adaptation and incorporation of these ideas into the existing law of torts, rather than to recommend the enactment by statute of a codified "public" tort law.

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[54] Evans, *supra*, note 10, at 660.

[55] *James v. Commonwealth*, *supra*, note 2.

[56] See discussion in Hogg, *supra*, note 46, at 113-19.

The goal of our recommendations is the more modest one of completing the reforms begun by the *Proceedings Against the Crown Act* by placing the Crown in the same position under the law as any other person. We turn now to those recommendations.

(b) Case for Reform of Direct Liability of the Crown

As we have indicated,[57] the liability of the Crown in Ontario under section 5(1) of the *Proceedings Against the Crown Act*[58] is laid out in specific enumerated heads of liability. Since these heads of liability are exhaustive, a residue of Crown immunity has been preserved. We have discussed a number of cases of direct liability that do not fit neatly into one of the heads of liability in section 5(1). If the Ontario Crown were the defendant in these types of cases, the Crown would be free from liability, and the injured parties left uncompensated. Under the present law, therefore, a potential for unfairness, however small, remains. It seems clear that the current statutory statement of the liability of the Crown in tort should be repealed and replaced by more general language that would govern all grounds of liability of the Crown in tort. This would be accomplished by our general recommendation, made above,[59] that the Crown and its servants and agents should be subject to all the civil liabilities and rules or procedure that are applicable to other persons who are of full age and capacity. This provision would avoid the unjustifiable gaps that results from the language of section 5 of the *Proceedings Against the Crown Act*. As we have indicated, this general statement is intended to encompass liability for all causes of action, including those such as quasi-contract that do not fit neatly within clearly recognizable areas of tort or contract.[60]

However, one final reform issue with respect to Crown immunity from direct tortious liability arises from section 5(5) of the *Proceedings Against the Crown Act*. It will be recalled that this section appears to be intended to protect the Crown from liability in circumstances where property in the Crown automatically vests by operation of law, for example, by escheat.[61] The original policy behind this provision, which was adopted from the Uniform Model Act,[62] is obscure. Although the circumstances contemplated by the section will be rare, it may nevertheless have been considered unfair that the Crown should be liable with respect to property that it has not

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[57] *Supra*, this ch., sec. 1(b)(iv).

[58] *Supra*, note 1.

[59] *Supra*, ch. 1, sec. 1, and draft Act, s. 2(1).

[60] Draft Act, s. 2(2)(b).

[61] Escheat is a process whereby the estate of a person who dies intestate without heirs passes to the Crown.

[62] Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of 1950* (1951), at 76.

chosen to own, and of which it may have no knowledge. However, the position of the Crown in this respect is not unique. There can also be circumstances where property vests in private persons, independent of any act or intention on their part. For example, it is possible for property to vest in the beneficiary under a will without her knowledge or intention.[63]

It is far more common for property to vest in the Crown by virtue of the operation of a statutory provision. For example, there are numerous provisions that allow the Crown to invoke forfeiture as a result of failure to meet statutory requirements, such as payment of taxes or registration requirements.[64] However, section 5(5) would not confer immunity on the Crown with respect to property that vests as a result of a statutory process that is invoked by the Crown, since such forfeiture would clearly involve an act or intention of the Crown. In these cases, the Crown would presumably be liable in tort with respect to the forfeited property as it is with respect to any other Crown property.[65]

However, it is conceivable that a statute might provide for automatic forfeiture upon the occurrence of a specified event, in which case the property could be considered to vest without the act or intention of the Crown; the Crown might not then be aware that the property has vested. Nevertheless, we see no reason why the government, if it chooses to implement such an automatic vesting provision, should then be entitled to claim that it is unfair that it must bear whatever risk is involved in such process, particularly since the alternative of providing an immunity with respect to such properties might leave an injured third party without legal recourse against either the Crown or the original owner.

In our view, in the absence of a clear justification for a rule to the contrary, the Crown should be governed by the same legal rules as apply to a private person in whom property vests independent of her act or intention. Accordingly, we recommend that section 5(5) of the *Proceedings Against the Crown Act* should be abolished.

(c) Case for Reform and Recommendations for Personal Liability of Crown Servants

As we have seen, many Crown servants have the benefit of extensive statutory immunities from personal liability for tort, immunities that are not enjoyed by ordinary employees. We turn now to consider whether Crown servants should continue to enjoy these unique protections.

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[63] See, *Estates Administration Act*, R.S.O. 1980, c. 143, s. 9(1).

[64] See, for example, *Corporations Act*, R.S.O. 1980, c. 95, s. 322.

[65] It will be recalled that s. 5(1)(d) makes the Crown tortiously liable "in respect of any breach of duties attaching to the ownership, occupation, possession or control of property". Our general recommendation would have the same effect.

Personal liability of Crown servants who act *bona fide* pursuant to apparent, though not actual, legal authority may be regarded as harsh. However, where, as at common law, the Crown itself is immune from suit by an injured party, such personal liability is justifiable. As between two innocent parties, the Crown servant and the subject whose rights have been invaded, we think that there is a strong argument that the Crown servant is the person who should bear the loss. The Crown servant comes to the job with knowledge of possible liability; she can presumably insure against that liability, and may be able to seek an indemnity from the Crown.

In fact, the Crown itself is now liable vicariously for the torts of its servants.[66] As a result, the importance of the immunity clause for Crown servants is much diminished. In practice, it is generally the Crown that is sued; the liability of the servant is established simply to fasten vicarious liability on the Crown.

Despite the diminished risk of personal liability for Crown servants, some commentators take the view that some degree of immunity from tortious liability should be conferred by statute on Crown servants.[67] They say that it is unfair that an honest and conscientious public servant should be placed at the risk of being successfully sued. Moreover, concern is expressed that the risk of suit would lead to overly cautious behaviour on the part of Crown servants whose jobs call for vigorous action.[68]

However, the Commission is not persuaded of the wisdom of, or the continuing need for, these standard immunity clauses. Moreover, the immunity clauses detract from the basic principle animating our proposed reforms, that the Crown and its employees should be subject to the same legal rules as other persons. In the ordinary employment law context, concerns about an employee's personal liability for torts committed in the course of their duties, and the effect that such liability could have on the vigorous execution of their tasks, are generally addressed by agreement between employer and employee. Indemnity clauses are commonly negotiated as part of the employment contract or through the collective bargaining process. In addition, an employee may be able to insure against such liability. There appears to be no reason in principle or practice why this should not be the case with respect to public as well as private employees.

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[66] *Proceedings Against the Crown Act*, *supra*, note 1, s. 5(1). See discussion of vicarious liability of the Crown, *supra*, this ch., sec. 1(d).

[67] Rubinstein, *supra*, note 28, at 145-47; Aranson and Whitmore, *supra*, note 10, at 20-21; and McCallum, "Personal Liability of Public Servants: An Anachronism" (1984), 27 Can. Pub. Admin. 611, at 614-15.

[68] This has been identified as a problem in the United States: Schuck, *Suing Government: Citizens Remedies for Official Wrongs* (1983), at 79-81.

This approach, which would involve the abolition of all statutory immunity clauses for Crown servants, would have the additional welcome effect of simplifying and making consistent the rules governing liability of Crown servants. As we have indicated, there is no rhyme or reason to the existing pattern of statutory immunity clauses that are currently scattered through a large number of statutes. There are occasional departures from the more standard form of the clause and the clause is inexplicably missing altogether from some statutes.[69]

The Commission therefore recommends that all statutory immunity clauses protecting Crown servants should be repealed and replaced by an appropriate scheme of indemnity.[70] We make no recommendation as to how such a scheme of indemnity should be implemented. In the ordinary employment context, the most common arrangement involves a combination of express and implied contractual indemnity of employees acting in the course of their duties. However, the Crown may wish to provide indemnity by regulation, statute, or any other device, or combination of devices, it deems appropriate.

We recognize that such alternative schemes cannot be implemented overnight. A transitional period will be required in order to allow the Crown to determine which mechanisms are appropriate for particular ministries and their employees and agents, and to ensure their proper implementation. Accordingly, we recommend that the abolition of all statutory immunity clauses should come into force two years following the proclamation of the proposed *Crown Liability Act*.[71]

Whatever system the Government chooses to implement, when it is in place the employees covered by the indemnity arrangement will have the protection of the scheme. If they are not now protected by an immunity clause, they will be better off. Employees who currently enjoy the protection of a statutory immunity clause will have instead the benefit of indemnity by the Crown.

The intention of this proposal is not to expose Crown employees to more extensive personal risk, but rather to replace a maze of ill-considered statutory protections with well-considered arrangements that are agreed upon by both management and labour as appropriately responsive to the needs of both government and individual Crown employees. The interests of those injured by the tortious act of a Crown employee will be served in that their right of action against the individual employee will be preserved. Indeed, their ability to prove their case will be improved because the Crown

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[69] For example, there is no immunity clause in either the *Ontario Human Rights Code*, R.S.O. 1980, c. 340, or the *Labour Relations Act*, R.S.O. 1980, c. 228.

[70] Draft Act, s. 11(1).

[71] *Ibid.*, s. 11(2).

employee will be subject to discovery. And the general principle, that the Crown and its employees should be bound by the same legal principles as apply to private employees, will be preserved.

(d) Case for Reform of Quasi-Judicial Immunity

As we have discussed,[72] all judges, including masters, in Ontario enjoy absolute immunity from civil liability provided they do not knowingly act beyond their jurisdiction. However, quasi-judicial decision makers, such as members of administrative boards, commissions or tribunals, enjoy only a limited immunity when carrying out duties of a judicial nature; they remain subject to a requirement of acting within jurisdiction and in good faith.

In the Commission's view, there is no principled reason why quasi-judicial decision makers should enjoy a more limited immunity than judges in Ontario. Recent developments in administrative law have increasingly imposed on members of boards, commissions and tribunals the requirement to act judicially when carrying out acts of a judicial nature. If we require these decision makers to act like judges, it seems fair and reasonable that we should treat them like judges. Moreover, the rationale for the protection of quasi-judicial decision makers is, to our minds, the same as that which justifies judicial immunity. It is not to protect the personal interests of the decision maker that the immunity is extended, but rather to protect the public interest in an independent, impartial justice system. To this end, administrative decision makers, no less than their judicial counterparts, must be able to act without fear of personal liability for what they say or do in fulfilling their judicial functions.

In our view, every member of a board, commission, agency or tribunal should enjoy the same immunity accorded to superior court judges when performing duties of a judicial nature, and we so recommend.[73] We make no comment at this time as to the appropriate scope of judicial immunity, except to observe that, as a matter of principle, what is applicable to judges should be applicable to all those who are required to act judicially.*

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[72] *Supra*, this ch., sec. 1(c)(iv).

[73] Draft Act, s. 6.

* Commissioners J.R.S. Prichard and Margaret Ross do not share the views of the majority on this issue. Dean Prichard's dissent, which follows, is concurred in by Mrs. Ross:

> I find myself unable to agree with the recommendation of the majority with respect to the immunity of quasi-judicial decision makers, a proposal that would significantly broaden the current immunity from civil liability enjoyed by such public officials. I accept that quasi-judicial decision makers require a reasonably wide latitude in the execution of their duties, free from fears of civil liability. It seems sensible, therefore, to treat such decision makers differently than other administrative officers who, under our proposed general regime of liability, will no longer enjoy immunity from civil liability, although they may be indemnified by the Crown.

(e) Case for Reform of Vicarious Liability of the Crown

(i) Effect of Immunity Clauses

The present law governing vicarious liability of the Crown for Crown servants operates in a generally satisfactory manner. A few residual matters do, however, require clarification. The first issue of concern arises by virtue of the operation of the statutory clauses that confer immunity on Crown servants. Since we have already recommended the general abolition of these clauses, a brief explanation of our concern will suffice.

At common law, a master is vicariously liable for the act or omission of a servant only if the servant has committed a tort. Any defence that is available to the servant will also shield the master from liability. This general principle of vicarious liability applies to the Crown as to any other employer, and has been codified in section 5(2) of the *Proceedings Against the Crown Act*, which provides that "no proceedings shall be brought against the Crown in respect of a tort committed by a Crown servant unless proceedings in tort could be brought against the servant". Furthermore,

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To this extent, I agree that quasi-judicial decision makers should be dealt with in a manner generally analogous to that of judges.

I am not, however, persuaded that the protection extended to quasi-judicial decision makers should be identical to that enjoyed at common law by superior court judges. As indicated, judges in Ontario enjoy absolute immunity unless they knowingly act outside their jurisdiction, while quasi-judicial decision makers are required to act within jurisdiction and *bona fides*. I agree that the requirement that quasi-judicial decision makers must be acting "within jurisdiction" is troublesome given the malleability of that concept, and therefore should be replaced by a requirement that quasi-judicial decision makers be acting "in the execution of their duties". I am greatly troubled, however, by the proposed abolition of the current requirement that the quasi-judicial decision maker should be acting *bona fides*, which is the effect of the majority recommendation.

In my view, this issue has not been sufficiently canvassed by our research program. It may be that, on closer inspection, persuasive grounds will be established for the rejection of the *bona fide* requirement. However, without more research, I think it would be unwise to eliminate the requirement of *bona fides* simply on the basis of a need for consistency of treatment between judges and quasi-judicial decision makers.

I take comfort in my position from the decision of the Supreme Court of Canada in *Nelles v. The Queen in Right of Ontario*, *supra*, note 42, which indicates that that Court shares certain reservations about the extension of unqualified immunities. And while I recognize that the decision of the Supreme Court of Canada in *Marshall v. MacKeigan*, *supra*, note 35, reconfirmed the common law principle of judicial immunity, it does not, in my view, provide a compelling rationale for the extension of absolute immunity to quasi-judicial decision makers.

Therefore, my preferred recommendation on this issue would be that quasi-judicial decision makers should have the same protection as that conferred upon judges of the superior court for any act done or omitted in the *bona fide* execution of their duty. Failing that, in the absence of a compelling argument or evidence favouring the majority recommendation, I would recommend that the status quo should be maintained.

section 5(4) of the Act provides that an enactment that negatives or limits the liability in tort of a Crown servant also negatives or limits the liability of the Crown itself.

As we have discussed,[74] many Ontario statutes contain immunity clauses that relieve Crown servants from liability in tort for acts done in good faith in the execution or intended execution of their duties. The effect of sections 5(2) and 5(4) of the *Proceedings Against the Crown Act* is that, unless an immunity clause expressly preserves the vicarious liability of the Crown, the clause will also immunize the Crown from liability. Consequently, an innocent victim may be left without redress.[75] This unfortunate result will be addressed by our recommendation for the abolition of statutory immunity clauses, which will restore the Crown's vicarious liability for all tortious acts of Crown servants.

(ii) Crown Liability for the Enforcement of Criminal Law

Our second concern relates to section 2(2)(d) of the *Proceedings Against the Crown Act*, which exempts the Crown from liability for "anything done in the due enforcement of the criminal law or of the penal provisions of any Act of the Legislature". In our view, this provision is confusing and possibly problematic, because of the uncertain meaning of the term "due enforcement". If "due enforcement" includes only acts authorized by law, this provision is simply declaratory of the general rule that an act that is authorized by law is not tortious, and is therefore unnecessary.[76] However, if "due enforcement" includes unauthorized, tortious acts by prosecutors, police, prison guards and other officials of the criminal justice system, then we regard the Crown's exemption to be clearly inappropriate. The effect of this exemption would be to leave individual officials personally exposed to tortious liability, while denying the plaintiff the option of suing the Crown. The unfortunate result of this exemption could be to discourage the vigorous enforcement of the criminal law, while providing no assurance of payment to an injured plaintiff who cannot recover from either the Crown servant or the Crown. Accordingly, the Commission recommends that section 2(2)(d) should be repealed.

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[74] *Supra* this ch., sec. 1(c)(iii).

[75] It is not surprising that clauses that confer immunity on Crown servants, but fail to preserve liability of the Crown, have been strictly construed by the courts in order to avoid injustice. See, for example, *Beatty v. Kozak*, [1958] S.C.R. 177, 13 D.L.R. 1, in which an immunity clause requiring good faith and reasonable care was strictly interpreted so as not to protect defendant police officers from liability in tort.

[76] *Long v. Province of New Brunswick* (1959), 19 D.L.R. (2d) 437, (N.B.A.D.), at 441.

(iii) Crown Liability for Torts Committed While Performing Judicial Functions

Finally, section 5(6) of the *Proceedings Against the Crown Act* exempts the Crown from liability for "anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in him or responsibilities that he has in connection with the execution of judicial process". As we have explained,[77] judges enjoy absolute immunity so long as they do not knowingly act outside jurisdiction. Under our earlier recommendation, the same rule will apply with respect to quasi-judicial decision makers. However, an act knowingly done without jurisdiction could give rise to tortious liability on the part of a judge or quasi-judicial decision makers. Our concern is that the phrase in section 5(6) "*purporting* to discharge responsibilities of a judicial nature" might well be interpreted to reach a case in which a judge or quasi-judicial decision maker has knowingly acted without jurisdiction, and thereby protect the Crown from vicarious liability for the judicial tort. Moreover, even aside from the language of section 5(6), because persons acting in a judicial capacity would probably not be characterized as servants of the Crown, it is likely that the Crown would not be vicariously liable for the torts of judges or quasi-judicial decision makers.[78]

In our view, the Crown's immunity from vicarious liability for torts committed in the exercise of judicial functions is not desirable. To be sure, under our earlier recommendation, a judge or quasi-judicial decision maker will rarely be personally liable in tort for anything done in a judicial capacity. Nevertheless, on those rare occasions where such a person is personally liable in tort, we believe the Crown should also be vicariously liable. To the extent that section 5(6) protects the Crown from vicarious liability for the torts of officials other than judges, such as prosecutors, who have responsibilities in the judicial process, it is even more clearly opposed to sound policy. Accordingly, we further recommend that section 5(6) should be repealed, and that the proposed *Crown Liability Act* should expressly provide that the Crown is vicariously liable for the torts of persons committed in the exercise or purported exercise of judicial responsibilities or duties.[79]

RECOMMENDATIONS

The Commission makes the following recommendations:

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[77] *Supra*, this ch., sec. 1(c)(iv).

[78] The position of a judicial or quasi-judicial decision maker would probably be characterized as an office rather than an employment, because of the absence of control by the appointing government: see *infra*, ch. 8.

[79] Draft Act, *supra*, note 60, s. 5(2).

1. All statutory immunity clauses protecting Crown servants should be repealed and replaced by an appropriate scheme of indemnity.

2. The abolition of all statutory immunity clauses should come into force two years following the proclamation of the proposed *Crown Liability Act*.

3. Every member of a board, commission or tribunal should enjoy the same immunity accorded to superior court judges when performing duties of a judicial nature.

4. Section 2(2)(d) of the *Proceedings Against the Crown Act*, which exempts the Crown from liability in respect of anything done in the due enforcement of the criminal law, should be repealed.

5. Section 5(5) of the *Proceedings Against the Crown Act*, which immunizes the Crown from liability with respect to property that vests by operation of law, should be abolished.

6. Section 5(6) of the *Proceedings Against the Crown Act* should be repealed, and the proposed *Crown Liability Act* should expressly provide that the Crown is vicariously liable for the tort of any person committed in the course of the exercise or purported exercise of judicial responsibilities or duties.

CHAPTER 3

CONTRACT

1. PRESENT LAW

(a) INTRODUCTION

The Crown is liable in contract at common law; there is no history of immunity, as in the case of tortious liability. There is no doubt that a petition of right would lie against the Crown for breach of contract, even if the claim were for unliquidated damages.[1] In Ontario, section 3 of the *Proceedings Against the Crown Act*[2] preserves the common law position by providing that a claim against the Crown that could formerly be enforced by petition of right may now be enforced by proceedings against the Crown in accordance with the Act.

In Ontario, in addition to the common law rules of contract, there are numerous statutory provisions and regulations that govern the making of government contracts. Moreover, there are rules and practices developed by the administration itself, including standard terms and conditions of contracting. In that narrow sense, there is a distinct body of law regulating government contracts, designed to ensure that government contracting decisions are made under appropriate bureaucratic supervision and control, that corruption and unfairness is eliminated from the letting of contracts, that competitive prices are obtained, that the work is monitored by government, and that there are remedies for unsatisfactory performance. Moreover, some rules regulating government contracts are intended to promote various social and political objectives, such as preference for domestic

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[1] *Thomas v. R.* (1874), L.R. 10 Q.B. 31, 23 W.R. 345, and *Windsor and Annapolis Railway Co. v. R.* (1886), 11 App. Cas. 607, C.R. 9 A.C. 245 (P.C., Can.). A bill in equity against the Attorney General was also available if equitable remedies were sought: see discussion in Hogg, *Liability of the Crown* (2d ed., 1989), at 4.

[2] R.S.O. 1980, c. 393. Section 3 provides:

> 3. Except as provided in section 29, a claim against the Crown that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceedings against the Crown in accordance with this Act without the grant of a fiat by the Lieutenant Governor.

suppliers, prohibition of discrimination and promotion of fair labour practices by contractors.[3]

However, while Ontario has developed certain distinctive legal rules and practice relating to government contracts, these developments have taken place within the rules of the private law of contract. As the following discussion will show, the position of a person contracting with the government continues to be governed mainly by the private law of contract. With only minor modifications, the law of contract that applies to private contracts is also the law applicable to public contracts.

(b) General Power of the Crown to Make Contracts

At common law, the Crown has the power of a natural person to enter into a contract; no statutory authority is necessary.[4] Indeed, it is common for governments to enter into contracts for which there is no clear statutory authorization. However, in order to perform a contract by payment of public funds, there must be a legislative appropriation of public funds.

(c) Requirement of Legislative Appropriation of Public Funds

It is a fundamental constitutional principle, although unwritten in Ontario, that all expenditures of public funds must be authorized by a vote of the Legislature. Such authorization is commonly referred to as an appropriation. In practice, the Legislature does not authorize each individual payment of public funds; rather, appropriation votes usually authorize broad categories of expenditures up to dollar limits stipulated in estimates approved by the Management Board of the Ontario Cabinet. As a result, it is rare that there is not an appropriation to meet an obligation incurred by government.

Because the requirement of a legislative appropriation applies to an expenditure for performance of a contract, as to any other expenditure, if there is no appropriation of funds in place to authorize the payment under such contract, the payment cannot be made. However, it appears well established that the absence of an appropriation does not excuse the Crown

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[3] A considerable literature has developed on the subject of government contracts. See, for example, Arrowsmith, *Government Procurement and Judicial Review* (1988); Lemieux, *Les contrats de l'administration federale, provinciale et municipale* (1984); and Lajoie, *Contrats administratifs* (1984).

[4] *J.E. Verreault & Fils Ltée v. Attorney-General of the Province of Quebec*, [1977] 1 S.C.R. 41, at 47, 57 D.L.R. (3d) 403, and *Attorney General of the Province of Quebec v. Labrecque*, [1980] 2 S.C.R. 1057, at 1082, 81 C.L.L.C. 247.

from performance.[5] The Crown's failure to make the contracted payment will be a breach of contract.[6]

By contrast, section 40 of the federal *Financial Administration Act*[7] makes the existence of an appropriation "a term" of any contract providing for the payment of public monies. The effect of this provision appears to be that the absence of an appropriation gives the Federal Crown an excuse for non-performance, thereby permitting it to escape from its contractual obligations even after the private party has performed her side of the contract. The policy of this provision is probably to preclude the unauthorized expenditure of public monies.

(d) Statutory Restrictions on Power of the Crown to Contract

As we have indicated, the Crown's common law power to enter into contracts may be restricted by statute. For example, section 13 of the *Ministry of Government Services Act*,[8] requires that all contracts in excess of $10,000 for the construction, renovation or repair of a public work must be subject to competitive tendering. An early decision of the Supreme Court of Canada, *The Queen v. Woodburn*,[9] characterized a requirement of this kind as mandatory, and held invalid a contract made in breach of the requirement.[10] While the law on this point is not entirely clear, *Woodburn*

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[5] The position is usually taken as settled by *New South Wales v. Bardolph* (1934), 52 C.L.R. 455, 8 A.L.J. 302 (Aus. A.C.).

[6] Whether a judgment against the Crown for damages for breach of contract could be satisfied in the absence of an appropriation for the purpose is a question that depends upon the rules regarding the enforceability of judgments against the Crown. As we shall discuss below, this ch., sec. 1(c), in Ontario, s. 26 of the *Proceedings Against the Crown Act* provides that the Treasurer of Ontario "shall" pay out of the Consolidated Revenue Fund any sum required to be paid by the order of a court. Section 26 is, in effect, a permanent appropriation of funds for the satisfaction of judgments, which ensures that a judgment creditor will be paid, even if the underlying contractual obligation did not come within an appropriation.

[7] R.S.C. 1985, c. F-11. Section 40 provides:

> 40. It is a term of every contract providing for the payment of any money by Her Majesty that payment under that contract is subject to there being an appropriation for the particular service for the fiscal year in which any commitment under that contract would come in the course of payment.

[8] R.S.O. 1980, c. 279.

[9] (1899), 29 S.C.R. 113.

[10] However, it should be noted that the failure to tender was not the only infirmity of the invalid contract in *The Queen v. Woodburn*. A statutory requirement of the approval of the Governor General in Council had also not been complied with. Note that it does not necessarily follow that a breach of statutory requirements in the making of a contract ought to make the contract invalid. Rather, such requirements could be regarded as

certainly suggests that section 3 of the *Ministry of Government Services Act* limits the power of the Crown itself to enter into contracts.[11]

There are numerous other statutory provisions respecting procurement and other government contracts that purport to limit the power of the Crown to enter into contracts.[12] However, as we shall discuss below,[13] most of these provisions are probably best regarded as a limitation on the authority of servants or agents of the Crown, rather than as a limitation on the capacity of the Crown itself.

(e) Power of Crown Servants to Make Contracts

(i) General Rules of Agency Apply

As a general rule, the scope of a Crown servant's authority to bind the Crown by contract is determined by the common law of agency.[14] No statute or order-in-council is required to provide the authority to contract. Unless limited by statute or by order-in-council, or other direction of cabinet, a minister, as the chief executive officer of a department, has actual authority to bind the Crown by contract in respect of all matters within the scope of her department's operations.[15] The minister's power may be delegated to the deputy minister and to lower officials.[16] Even in the absence of a delegation, the common law doctrine of ostensible or usual authority may make contractual undertakings by officials binding.

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directory, rather than mandatory, in which case their breach would not lead to invalidity. Directory rules are not necessarily unenforceable, since they might form the basis of an injunction prior to the making of a contract, and their breach might expose civil servants to disciplinary action or even to prosecution. See discussion in Hogg, *supra*, note 1, at 166.

In *Breton v. Corporation de la paroisse de St.-Gedeon*, [1956] B.R. 442, the Quebec Court of Appeal reached an opposite conclusion to the *Woodburn* decision, with respect to a similar statutory requirement, upholding the contract despite the absence of a public tender. Tenders had been obtained by invitation, which was not the public call for tenders required by the statute, but which could perhaps have been treated as substantial compliance.

[11] The position is discussed by Arrowsmith, *supra* note 3, at 434-37.

[12] See, for example, s. 6 of the *Executive Council Act*, R.S.O. 1980, c. 147, which provides that "[n]o contract or deed in respect of any matter under the control or direction of a minister is binding on Her Majesty or shall be deemed to be the act of such minister unless it is signed by him or is approved by the Lieutenant Governor in Council".

[13] *Infra*, this ch., sec. 1(e)(ii).

[14] *J.E. Verreault & Fils Ltée v. Attorney-General of the Province of Quebec*, *supra*, note 4, at 41, rejecting older cases that insisted upon statutory authority. See, generally, Reynolds (ed.), *Bowstead on Agency* (15th ed., 1985), and Fridman, *Law of Agency* (5th ed., 1983).

[15] *The Queen v. Transworld Shipping Ltd.*, [1976] 1 F.C. 159 (C.A.), at 163, 61 D.L.R. (3d) 304, and *The Queen v. C.A.E. Industries Ltd.*, [1986] 1 F.C. 129, 20 D.L.R. (4th) 347 (C.A.).

[16] *The Queen v. Transworld Shipping Ltd.*, *supra*, note 15, at 164.

(ii) Statutory Restrictions on the Authority of Crown Agents

While the general common law rules of agency allow a Crown agent or servant with actual, ostensible, or usual authority to bind the Crown, those rules cannot override a statutory restriction on the authority of servants or agents to bind the Crown.[17] Statutory restrictions must be complied with, even if the private contractor is unaware of the restrictions: a "contractor dealing with the Government is chargeable with [deemed to possess] notice of all statutory limitations placed upon the power of public officers".[18] For example, where there is a statutory requirement of an order-in-council to authorize a contract, a contract entered into without order-in-council, or beyond the scope of order-in-council, is invalid.[19]

Nevertheless, despite this general obligation to adhere to statutory restrictions, the courts have used various interpretive devices in order to avoid injustice to the private contractor where the Crown has invoked a defect in its own internal contracting procedures in order to escape from its contractual obligations. The tendency of recent cases has been to require very clear statutory language to displace the normal rules of agency. Provisions regulating contracting power have been interpreted narrowly so as not to apply to the contract in issue.[20] Or such provisions have been interpreted as empowering rather than restricting, and therefore not precluding the operation of the normal rules of agency.[21] Or the provisions have been construed as directory rules of indoor management, rather than mandatory restrictions on the authority of ministers or officials.[22]

Consider, for example, section 6 of the Ontario *Executive Council Act*,[23] which provides:

> 6. No deed or contract in respect of any matter under the control or direction of a minister is binding on Her Majesty or shall be deemed to be the act of such minister unless it is signed by him or is approved by the Lieutenant Governor in Council.

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[17] *Attorney-General for Ceylon v. Silva*, [1953] A.C. 461, [1953] 2 W.L.R. 1185 (P.C.).

[18] *The Queen v. Woodburn*, *supra*, note 9, at 123.

[19] *Ibid.*; *Mackay v. Attorney-General for British Columbia*, [1922] 1 A.C. 457, [1922] All E.R. 875 (P.C., Can.); and *Gooderham & Worts v. Canadian Broadcasting Corporation*, [1947] A.C. 66, 63 T.L.R. 73, (P.C., Can.).

[20] For example, formal requirements have been held inapplicable to oral contracts: *The Queen v. Henderson* (1898), 28 S.C.R. 425, at 425-33; and *The Queen v. Transworld Shipping Ltd.*, *supra*, note 15, at 172-73.

[21] See, for example, *J.E. Verreault & Fils Ltée v. Attorney-General of the Province of Quebec*, *supra*, note 4 at 45; and *The Queen v. C.A.E. Industries Ltd.*, *supra*, note 15, at 166-168 (C.A.). See, generally, *Clark v. The Queen in Right of British Columbia* (1979), 99 D.L.R. (3d) 454, 15 B.C.L.R. 311 (B.C.S.C.).

[22] *The Queen v. Transworld Shipping*, *supra*, note 15, at 171.

[23] R.S.O. 1980, c. 147.

On its face, this provision seems to require the minister's personal signature, or the approval of an order-in-council, for every government contract, however small. This is an utterly impractical requirement. Given the trend in the case law discussed above, a court would probably read this requirement subject to the provisions of the *Public Service Act*,[24] which authorizes a deputy minister to exercise functions assigned to her by the minister, and authorizes the deputy minister to further delegate, in writing, these functions to any public servant.[25] It is very unlikely that the Crown would be able to avoid its contractual obligation by relying on the absence of the signature of the appropriate minister.

(f) Defence of "Executive Necessity"

There is some English authority to the effect that the Crown may plead "executive necessity" as a defence to an action for breach of contract. In *Rederiaktiebolaget Amphitrite v. The King*,[26] during the first world war the Crown gave an undertaking to a foreign shipowner that, if he delivered a particular cargo to Britain, his ship would not be seized by the government. The government seized the ship in violation of the undertaking. The court held that the Crown was not bound by its undertaking, on the ground that "it is not competent for the Government to fetter its future executive action which must necessarily be determined by the needs of the community when the question arises".[27] Although *The Amphitrite* is often cited for the proposition that the Crown cannot "fetter its future executive action", it appears never to have been followed in either the United Kingdom or Canada. The case has also been severely criticized.[28]

However, a related line of cases holds that statutory powers may not be fettered by contract.[29] In *The King v. Dominion of Canada Postage Stamp Vending Company Ltd.*,[30] it was held that the Crown could not grant to a company a licence to sell postage stamps that was renewable in perpetuity. In effect, the *Post Office Act* was construed as limiting the power of the

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[24] R.S.O. 1980, c. 418, ss. 21(1) and 23.

[25] As well, many statutes dealing with particular departments of government contain provisions authorizing delegation by the minister to the deputy minister, and sometimes expressly authorizing the deputy minister to sign a contract on behalf of the minister: See, for example, *Ministry of Transportation and Communications Act*, R.S.O. 1980, c. 289, s. 4; *Ministry of Industry and Trade Act*, S.O. 1982, c. 31, ss. 9(2)(3).

[26] [1921] 3 K.B. 500, [1921] All E.R. Rep. 542.

[27] *Ibid.*, at 503.

[28] For discussion, mostly critical, see Arrowsmith, *supra*, note 3, at 125-30; Hogg, *supra*, note 1, at 129-40; Turpin, *Government Contracts* (1972), at 19-25; and Aranson and Whitmore, *Public Torts and Contracts* (1982), at 194-203.

[29] These cases mostly involve municipal bodies: see Hogg, *supra*, note 1, at 170-71.

[30] [1930] S.C.R. 500, 4 D.L.R. 241.

Postmaster General to make long-term contracts that could not be revoked if the public interest so required.

(g) Personal Liability of Crown Servants in Contract

(i) General Rule

At common law, an agent who makes a contract between the principal and a third party is not personally liable under the contract.[31] This rule applies to contracts made on behalf of the Crown.[32]

(ii) Breach of Warranty of Authority

This general rule applies even if the self-styled agent is acting without the authority of the principal. However, where an unauthorized agent has represented that she had authority to bind the principal, and the third party has entered into the contract in reliance on that representation, the agent is liable to the third party under a "warranty of authority".[33] The warranty of authority is a separate contract between the agent personally and the third party.

An agent's representation as to his authority may be express or implied. There is some English authority to the effect that a Crown servant cannot be held personally liable under an implied warranty of authority.[34] The reason given for the immunity was that the servant who made the contract in that case did so solely in his capacity as agent for the Crown. However, this decision is problematic. As we shall discuss in the following section, if an agent contracts personally, as well as on behalf of the principal, then the agent is personally liable under the main contract. Therefore, there is no need to rely on a warranty of authority *except* where the Crown servant acted solely as agent of the Crown. The court's reason would confer immunity from an express warranty no less than an implied warranty, although the court conceded that a Crown servant would be liable under an express warranty.[35]

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[31] See Reynolds (ed.), *supra*, note 14, at 425-26, and Fridman, *supra*, note 14, at 193-94.

[32] *Macbeath v. Haldimand* (1786), 1 T.R. 172; 99 E.R. 1036, and *Rice v. Chute* (1801), 1 East 579, 102 E.R. 224.

[33] Reynolds (ed.), *supra*, note 14, at 426-27, and Fridman *supra*, note 14, at 194-95.

[34] *Dunn v. Macdonald*, [1897] 1 Q.B 555, [1895-99] All E.R. Rep. 1125 (C.A.).

[35] *Ibid.*, at 557. The unauthorized contract in *Dunn v. Macdonald* was a contract to employ a consular agent for a fixed term. In previous proceedings it had been held that it was a rule of law that Crown servants are dismissible at pleasure, and that the servant who purported to make the contract of service for a fixed term could not have had the authority to do so: *Dunn v. The Queen*, [1896] 1 Q.B. 116, [1895-99] All E.R. Rep. 907 (C.A.), at 116. Now it is clear that no warranty of authority arises where the agent's

(iii) Agent Contracting Personally

There is an important exception to the general rule that an agent is not liable under a contract made on behalf of a principal. If the agent contracts personally, as well as on behalf of the principal, then the agent and the principal are both liable. While there are no reported cases on point, there is little doubt that this rule would apply to an individual Crown servant who was sufficiently imprudent to bind herself as well as the Crown to perform the terms of a Crown contract. The rule of personal liability of an agent also applies to public bodies that are agents of the Crown.[36]

(iv) Statutory Immunity Clauses

As we discussed in the context of torts,[37] in Ontario many statutes establishing ministries or other agencies of the government include a standard immunity clause that protects each employee from liability for damages "for any act done in good faith in the execution or intended execution of his duty or for any alleged neglect or default in good faith of his duty".[38] This clause would protect a Crown servant from personal contractual liability, as well as personal tortious liability, provided the servant acted "in good faith in the execution or intended execution of his duty".

2. CASE FOR REFORM AND RECOMMENDATIONS

(a) General

As the foregoing discussion indicates, for the most part the private law of contract currently governs the liability of the Crown in contract. In our view, it does so in a generally satisfactory manner. Nevertheless, a number

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lack of authority is a matter of law of which the third party should have been aware. Hogg, *supra*, note 1, at 173, argues that the decision in *Dunn v. Macdonald*, *supra*, note 34, can be explained on this basis, and that it should not be accepted as laying down a rule that a Crown servant may never be liable under an implied warranty of authority. See Street, *Governmental Liability* (1953), at 93, and Glanville, *Crown Proceedings* (1948), at 3, who regard *Dunn v. Macdonald* as explicable on a basis similar to that suggested above. Nevertheless, the decision has been followed in at least two cases: *Kenny v. Cosgrove*, [1926] Ir. R. 517, at 526; and *O'Connor v. Lemieux* (1927), 60 O.R. 365, [1927] 3 D.L.R. 77 (H.C.J.), at 369, aff'd on other grounds (1927), 60 O.R. 374 (C.A.).

[36] *International Railway Co. v. Niagara Parks Commission*, [1941] A.C. 328, [1941] 2 All E.R. 456 (P.C., Can.); *Yeats v. Central Mortgage and Housing Corporation*, [1950] S.C.R. 513, [1950] 3 D.L.R. 801; *Langlois v. Canadian Commercial Corporation*, [1956] S.C.R. 694, 5 D.L.R. (2d) 410; and *Northern Pipeline Agency v. Perehinec*, [1983] 2 S.C.R. 513, 4 D.L.R. (4th) 1.

[37] *Supra*, ch. 2, sec. 1(c)(iii).

[38] See, for example, *Ministry of Community and Social Services Act*, R.S.O. 1980, c. 274, s. 8.

of specific areas of concern have been identified as requiring consideration and reform. However, before turning to these issues, we wish to address a more general proposal for reform of the contractual liability of the Crown.

A suggestion has been made that the Crown should be able to avoid its contractual obligations where public policy calls for non-compliance.[39] This is not a totally novel idea. It will be recalled that this principle underlies the decision in the *Amphitrite*[40] case, where the court relied on a claim of "executive necessity" in allowing the Crown to escape its contractual undertaking. However, for a variety of reasons, the Commission rejects the idea that the Crown should be able to avoid its contractual obligations on the grounds of public policy.

As a matter of principle, we reiterate our view, elaborated in the General Introduction to this report, that there should not be a "public law" governing liability of the Crown, and that the Crown should be bound by the same law, including contract law, as a private person. Moreover, we believe that, as a practical matter, a rule that allowed the Crown to escape from its contractual obligations, on the basis of such an elastic notion as public policy, would be both unsound and unnecessary. It would be unsound from a marketplace perspective because the risk to private contractors represented by the power of the Crown to unilaterally abrogate a contract would seriously impair the credit of the Crown. The result would undoubtedly be higher prices for everything obtained by the Crown by contract.

Such a rule would also be unnecessary because the private law of contract currently accommodates, in our view satisfactorily, those rare occasions where the Crown has a sound public policy reason for breaking a contract. The Crown, like other participants in the marketplace, is entitled to seek special privileges in its contracts, including a unilateral right of termination, provided that it is willing to pay for them. In fact, "termination for convenience" clauses, which give the Crown the right to terminate a contract on notice to the private contractor, are commonly inserted in Ontario government procurement contracts. It is significant, however, that these clauses virtually always call for compensation to be paid to the private contractor for any work actually performed.[41] And to the extent that the compensation falls short of full damages for breach, these clauses probably add to the price of the goods or services being procured.

Where no such termination clause is included in a contract, the Crown is under the same obligation as any other person to compensate an injured party for a breach of contract. In this way, the costs of public policy are

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[39] This is the thesis of Mitchell, *The Contracts of Public Authorities* (1954). See, also, Mewett, "The Theory of Government Contracts" (1959), 5 McGill L.J. 222.

[40] *Supra*, note 26.

[41] Termination for convenience clauses are discussed by Arrowsmith, *supra*, note 3, at 55-57 and 248-50.

borne by the Crown, and the public at large, rather than the individual contractor. This is as it should be. We can see no good reason to shift the entire cost of a public policy decision to an individual who happens to have contracted with the government.

Finally, it should always be remembered that the Crown's ultimate recourse in furtherance of public policy is legislation. There may be a rare case where the decision of a court in holding the Crown liable for a breach of contract is completely unacceptable. For example, a court might award damages that are so high as to place an intolerable cost on a desired public policy objective.[42] Or a court might unjustifiably award an injunction or specific performance against the Crown that would prevent the government from carrying out an important public policy. In such cases, the Crown has the option to legislate in order to reverse or modify the decision.[43] The Ontario Legislature has always had the power to enact laws expropriating private property and private rights, and this power is not limited by any obligation to pay compensation.[44] The *Canadian Charter of Rights and Freedoms*[45] does not provide any general protection for private property[46] or any general prohibition on retroactive laws.[47]

In this area, as in others, the Commission's view is that there ought not to be a special public law applicable to the Crown. The thrust of any Ontario reform of Crown liability should be to reduce the significance of the status of the Crown, assimilating the Crown as far as possible to a private person, and ensuring that those who are injured by Crown activity have the same remedies as those who are injured by private activity. Here again, our general recommendation made in chapter 1 will ensure that the Crown and its agents or servants will be subject to all contractual liability to which they would be liable if the Crown were a person of full age and capacity. As indicated, this recommendation is intended to apply to all areas of law, including contract law.

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[42] A U.K. precedent is the *War Damage Act, 1965* (U.K.), retroactively denying compensation that had been awarded in *Burmah Oil Co. (Burmah Trading) Ltd. v. Lord Advocate*, [1965] A.C. 75, [1964] 2 W.L.R. 1231 (H.L.).

[43] Hogg, *Constitutional Law of Canada* (2d ed., 1985), at 775-76.

[44] *Ibid.*, at 574-79.

[45] Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.) as am. by the Constitution Amendment Proclamation, 1983, SI/84-102.

[46] Hogg, *supra*, note 43, at 775-76. Section 7 of the Charter, *ibid.*, protects "life, liberty and security of the person", but not property.

[47] *Ibid.* Section 11(g) of the Charter, *supra*, note 45, prohibits retroactive penal laws, but not other kinds of retroactive laws.

(b) Rule Against the Crown Fettering its Discretion

One unsatisfactory area of the current law governing contractual liability of the Crown relates to the foregoing discussion of unilateral abrogation of a contract by the Crown. As we indicated, there is a line of authority, related to the notion of "executive necessity", that prohibits the Crown from fettering its discretion by contract. These cases allow long term contracts with the Crown to be revoked where the public interest so requires.[48] For the reasons given above, we recommend that the doctrine that the Crown cannot fetter its discretion by contract should be abrogated by the proposed *Crown Liability Act*.[49] The Act should provide that a contract made on behalf of the Crown is valid and enforceable even if the contract fetters discretionary powers conferred by statute or common law.

(c) Statutory Limitations on Authority to Contract

Another area of concern with respect to the Crown's liability in contract relates to the various statutory prerequisites and limitations on the authority of the Crown or its servants that can affect the validity of a contract with the Crown.

As a general matter, we do not think that a private contractor should be able to escape from a contractual commitment through the fortuitous discovery of a breach of statutory authority by the Crown or its servants. Nor, in our view, should such a breach allow the Crown to escape from a contractual commitment. It is arguably both unrealistic and unreasonable to expect a contractor to investigate the chain of delegation within government in order to be certain of full compliance with all statutory rules.

While it may be argued that statutory limitations on contractual authority are necessary in order to control the expenditure of public monies, there currently exist numerous internal governmental controls designed to preclude unauthorized expenditures, including the oversight of the Management Board of Cabinet, the Auditor General and the Public Accounts Committee of the Legislature.[50] Moreover, statutory limitations on authority or statutory prerequisites need not necessarily be used to invalidate a contract in order to be useful tools in promoting fiscal responsibility. Such provisions can be treated as directory, rather than mandatory. While breach of a directory rule or requirement does not give rise to invalidity of a

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[48] See discussion *supra*, this ch., sec. 1(f).

[49] *Crown Liability Act*, *infra*, Appendix 1 (hereinafter referred to as the "draft Act"), s. 2(2)(e).

[50] See *Audit Act*, R.S.O. 1980, c. 25, s. 9; *Management Board of Cabinet Act*, R.S.O. 1980, c. 254, s. 3; and *Ministry of Treasury and Economics Act*, R.S.O. 1980, c. 291, ss. 10 and 11.

contract,[51] it could form the basis of an injunction prior to the making of a contract, and might also expose a Crown servant to disciplinary action, or even prosecution. These are both effective methods of controlling unauthorized public spending.

The Commission considered making a recommendation that the new *Crown Liability Act* should provide that a breach of a statutory requirement in the making of a contract by the Crown does not affect the validity of the contract. However, we are concerned that such a rule might be too categorical, in view of the variety of statutory requirements that exist. Moreover, as we have indicated, many statutory requirements have been narrowly construed by the courts in order to avoid obvious injustices. Given that this trend satisfactorily addresses our major concerns, it seems preferable to leave the question of the effect of a breach of a statutory requirement to be determined by the courts.

(d) Statutory Immunity Clauses

We have also seen that Crown servants currently enjoy certain statutory immunities and that these immunity clauses govern the liability of a Crown servant in contract, as well as tort. The risk to a Crown servant of personal contractual liability is not nearly as pervasive as the risk of personal tortious liability; indeed, the case law suggests that the risk of personal contractual liability is negligible. Nevertheless, our earlier recommendation,[52] that statutory immunity clauses should be abolished and replaced by an appropriate scheme of indemnity for Crown employees, should apply with respect to contractual liability of Crown servants as well.

(e) Warranty of Authority

As we discussed above,[53] there is some English authority that a Crown servant is not liable for a breach of a warranty of authority. However, the leading case to this effect has been subject to criticism and may be explained on other grounds.[54] Nevertheless, we regard the uncertain state of the law as unsatisfactory. Under our general recommendation, made above, a Crown servant would be subject to the same principles that govern private employees and agents. This recommendation should ensure that a Crown servant, like others, is liable for a breach of warranty of authority.

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[51] See discussion *supra*, note 10.

[52] *Supra*, ch. 2, sec. 2(c).

[53] *Supra*, this ch., sec. 1(g)(ii).

[54] *Ibid.*

Recommendations

The Commission makes the following recommendations:

1. Our general recommendation (Recommendation 2, Chapter 1) will ensure that the Crown and its agents or servants will be subject to all contractual liability to which they would be liable if the Crown were a person of full age and capacity.

2. The doctrine that the Crown cannot fetter its discretion by contract should be abrogated by the proposed *Crown Liability Act*. The Act should provide that a contract made on behalf of the Crown is valid and enforceable even if the contract fetters discretionary powers conferred by statute or common law.

3. The earlier recommendation (Recommendation 1, Chapter 2), that statutory immunity clauses should be abolished and replaced by an appropriate scheme of indemnity for Crown employees, should apply as well with respect to contractual liability of Crown servants and agents.

CHAPTER 4

REMEDIES

1. INTRODUCTION

In this chapter, the Commission examines the extent to which various legal remedies are available against the Crown.[1] As we shall see, the residual immunities of the Crown to a number of the remedies discussed below are based largely on historical rationalia that are no longer relevant, persuasive or justified.[2]

2. DAMAGES

(a) PRESENT LAW

Damages are the basic common law remedy for causes of action in contract and tort. In 1874, it was held that the petition of right lay to recover damages in contract from the Crown.[3] In Ontario, section 3 of the *Proceedings Against the Crown Act*[4] provides that any claim against the Crown that could have been enforced by petition of right "may be enforced as of right by proceedings against the Crown" in accordance with the Act. Accordingly, damages continue to be recoverable in a contract action against the Crown.

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[1] See, generally, Hogg, *Liability of the Crown* (2d ed., 1989), ch. 2; Mundell, "Remedies against the Crown", in Special Lectures of the Law Society of Upper Canada, *Remedies* (1961), 148; and Jack, "Suing the Crown and the application of the Charter" (1986-87) 7 Advocates' Q. 277.

[2] The Commission's focus is on the law of Ontario, but reference is also made to the law of the other provinces and the United Kingdom. See Canada, *Crown Liability Act*, R.S.C. 1985, c. C-50; *Federal Court Act*, R.S.C. 1985, c. F-7; British Columbia, *Crown Proceeding Act*, R.S.B.C. 1979, c. 86; Alberta, *Proceedings Against the Crown Act*, R.S.A. 1980, c. P-18; Saskatchewan, *The Proceedings Against the Crown Act*, R.S.S. 1978, c. P-7; Manitoba, *Proceedings Against the Crown Act*, R.S.M. 1987, c. P-140; Ontario, *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393; Quebec, Code of Civil Procedure, R.S.Q. 1977, c. C-25; New Brunswick, *Proceedings Against the Crown Act*, R.S.N.B. 1973, c. P-18; Nova Scotia, *Proceedings Against the Crown Act*, R.S.N.S. 1967, c. 239; Prince Edward Island, *Crown Proceedings Act*, R.S.P.E.I. 1974, c. C-31; Newfoundland, *Proceedings Against the Crown Act*, S.N. 1973, c. 59; and United Kingdom, *Crown Proceedings Act, 1947*, 10 & 11 Geo. 6, c. 44.

[3] *Thomas v. The Queen* (1874), L.R. 10 Q.B. 31, 23 W.R. 345 (Q.B.).

[4] *Supra*, note 2.

As we have discussed,[5] at common law, the Crown was immune from liability in tort, based upon the supposed impossibility of the Crown committing a tort. Accordingly, the victim of a Crown tort was denied the right to recover damages. This injustice was remedied when the Crown's immunity from the substantive law of tort was abrogated by statute.

(b) Recommendation

Since damages are available against the Crown, no change in the law is needed or recommended.

3. INJUNCTION AND SPECIFIC PERFORMANCE

(a) Present Law

At common law, the remedies of injunction and specific performance were not available against the Crown.[6] The courts consistently refused to allow a coercive order to be made against the Crown, although a declaration could be made in lieu of an order for specific performance. The reasons given for this refusal were twofold: the first was the perceived incongruity of the Queen's courts issuing an order against the Queen; the second was the impossibility of punishing the Queen for contempt of court.[7]

Section 18(1) of the *Proceedings Against the Crown Act* expressly prohibits relief against the Crown by way of either injunction or specific performance. However, section 18(1) provides that the court "in lieu thereof may make an order declaratory of the rights of the parties".[8]

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[5] *Supra*, ch. 2, sec. 1.

[6] *Grand Council of Crees (Que.) v. The Queen*, [1982] 1 F.C. 599, 124 D.L.R. (3d) 574 (C.A.). See, also, Spry, *The Principles of Equitable Remedies* (3d ed., 1984), at 334-44, and Sharpe, *Injunctions and Specific Performance* (1983), at 349.

[7] *R. v. Powell* (1841), 1 Q.B. 352, at 361; 113 E.R. 1166. See, also, Hogg, *supra*, note 1, at 22-29, and Sharpe, *supra*, note 6, at 349-50.

[8] In eight provinces, the provision is the same as the one in Ontario: B.C., *supra*, note 2, s. 11; Alta., *supra*, note 2, s. 17; Sask., *supra*, note 2, s. 17; Man., *supra*, note 2, s. 17; N.B., *supra*, note 2, s. 14; N.S., *supra*, note 2, s. 15; P.E.I., *supra*, note 2, s. 15; Nfld., *supra*, note 2, s. 17. In Quebec, s. 94.2 of the Code of Civil Procedure, *supra*, note 2, provides that: "[n]o extraordinary recourse or provisional remedy lies against the Crown"; and the Code includes an injunction as a provisional remedy. Section 100 of the Code also prohibits an extraordinary recourse or provisional remedy against ministers and officers subject to certain conditions. In the Quebec provisions, no reference is made to declaratory relief in lieu of injunctive relief.

The federal *Crown Liability Act*, *supra*, note 2, is silent regarding injunctions, so that the Crown in right of Canada is immune by virtue of the common law: *Grand Council of Crees v. The Queen in Right of Canada*, [1982] 1 F.C. 599, 124 D.L.R. (3d) 574 (C.A.). As to the availability of injunctive relief against the Crown in Australia, see Hogg, *supra*, note 1, at 23 and 27.

Perhaps the most unfortunate result of the Crown's immunity from injunction is that interlocutory relief is unavailable against the Crown. As we shall discuss below,[9] because the Crown or its agents and servants will almost always act in accordance with a court declaration, a declaration will generally have the same practical effect as an injunction. However, because a declaration is by its nature final, it cannot serve as a vehicle for interlocutory relief, which is available, where appropriate, against all other legal persons.[10]

(b) Case for Reform and Recommendation

As we have indicated, the principal reason why the coercive remedies, including injunction, specific performance, and mandamus, are not available against the Crown has been the refusal of the courts to attempt to coerce the Crown. This refusal was based on two related concerns with which we shall deal in turn.

The first concern is the alleged incongruity of one branch of government, the courts, commanding another branch, the executive. In our view, this concern is largely anachronistic and no longer constitutes a problem. There appears to be no reason in principle why the Crown should not be subject to the same remedies as other legal persons. As we have indicated, the Crown in right of Ontario is for most purposes treated by the courts as a legal person, capable of suing and being sued. The Crown has, from the earliest times, been obliged to pay damages ordered by the courts. Discovery, a "coercive" procedure that is discussed below, has been available against the Crown for some time in Ontario.[11]

The second concern is the difficulty of enforcing such a command. The coercive remedies are enforced by bringing an application for civil contempt of court against the contemnor. The penalties for such a breach, in the discretion of the court, are fine or imprisonment. It is said that the possibility that the Crown may be held in contempt raises the potential of damaging or even irreconcilable constitutional confrontation.

The Commission does not find this argument persuasive. For the reasons given in chapter 6, we will recommend that orders against the Crown should be subject to enforcement by way of contempt proceedings. Moreover, we believe that, even if the Crown remained immune from civil contempt, such orders would be worth making. As a matter of principle, the full range of remedies ought be available against the Crown, as it is against any other person, so that the court is in a position to make

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[9] *Infra*, this ch., sec. 4(a).

[10] As we shall see, the courts have occasionally issued an interlocutory declaration, although the validity of such a remedy is in serious doubt: *infra*, this ch., sec. 4(a)(iii).

[11] Subject to certain limitations, described, *infra*, ch. 5, sec. 3.

whatever order is appropriate in the situation. We feel confident that, as with declarations, the Crown would nearly always obey the order, and therefore the issue of enforcement would rarely arise. To be sure, in the exceptional case where the Crown refused to obey and remained immune from contempt proceedings, the plaintiff would have no further legal recourse. However, that rare case would not be a sufficient reason for denying the court the power to grant an injunction against the Crown in all appropriate cases.

It may be argued that, because the remedy of a declaration is available against the Crown, there is no need to alter the law with respect to the Crown's immunity from injunction or specific performance. Our response to this suggestion is twofold. First, as a matter of principle, it is undesirable to have a special regime of remedial law applicable to the Crown, which is the effect of substituting the declaration for the injunction in proceedings against the Crown. Secondly, as we have indicated, the declaration is an inadequate substitute for the injunction, since interlocutory relief is not available in the form of a declaration. Interlocutory relief is sought in private litigation in Canadian courts almost every day. It is clear to us that this relief would also be useful against the Crown, and, in our view, should be available.[12]

It has also been suggested that Crown immunity from the coercive remedies generally is justifiable on the ground that the Crown ought to be free to act unlawfully, without risk of judicial intervention, where compelling interests of state require, as, for example, in an emergency.[13] However, we agree with the observation that such an exception to the rule of law is too sweeping.[14] These are discretionary remedies. Even given the possibility that some unforeseen crisis might compel illegal action by the Crown, we believe that the courts can be relied upon to take account of any compelling state interests that would be injured by any order sought.[15] Moreover, the ultimate safeguard of such interests is the power of the Legislature to reverse the decision of a court granting an injunction against the Crown.

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[12] For a description of one of the cases where interlocutory relief was needed against the Crown, see *infra*, this ch., sec. 4(a)(iii), note 28.

[13] Barnes, "*The Crown Proceedings Act, 1947*" (1948), 26 Can. B. Rev. 387, at 395.

[14] Street, *Governmental Liability* (1953), at 142.

[15] See *Attorney General of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, at 135, 38 D.L.R. (4th) 321.

The Law Reform Commission of British Columbia, after a careful study of the question, recommended in 1972 that the Crown's immunity from injunction be abolished in British Columbia: Law Reform Commission of British Columbia, *Legal Position of the Crown* (1972) (hereinafter referred to as the "B.C. Report"), at 31. Unfortunately this recommendation was not accepted, and British Columbia's *Crown Proceedings Act*, *supra*, note 2, like that of the other provinces, contains the standard provision precluding injunctions (s. 11).

Accordingly, we recommend that section 18 of the *Proceedings Against the Crown Act* should be repealed. A new *Crown Liability Act* should provide that the remedies of injunction and specific performance are available against the Crown.[16]

4. DECLARATION

(a) PRESENT LAW

(i) General

Declaratory relief is available against the Crown.[17] Unlike the remedies discussed thus far, a declaration does not involve a coercive decree. It therefore avoids the problems of commanding the Crown and enforcing an order against the Crown that led the courts to create Crown immunity from these other remedies.

Prior to the Ontario *Proceedings Against the Crown Act*,[18] a declaration could be obtained against the Crown by petition of right.[19] With the abolition of the petition of right, a declaration may be obtained against Her Majesty in right of Ontario in an ordinary action or application under the Rules of Civil Procedure[20] and under the *Judicial Review Procedure Act*.[21]

As we have indicated, despite the absence of a coercive decree, a declaration remains an effective remedy against the Crown because public officials can usually be relied upon to obey the law once it has been declared by a court.[22]

(ii) *Dyson* Procedure

An alternative means of obtaining a declaration against the Crown, upheld by the English Court of Appeal in 1910 in *Dyson v. Attorney*

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[16] *Crown Liability Act*, *infra*, Appendix 1 (hereinafter referred to as the "draft Act"), s. 2(2)(c).

[17] *Proceedings Against the Crown Act*, *supra*, note 2, s. 18.

[18] *Supra*, note 2.

[19] *The King v. Bradley*, [1941] S.C.R. 270, [1941] 2 D.L.R. 737, and *The Queen v. Crawford*, [1960] S.C.R. 527, 23 D.L.R. (2d) 241.

[20] O. Reg. 580/84.

[21] R.S.O. 1980, c. 224.

[22] However, this is not always the case: see *Peralta v. Minister of Natural Resources of Ontario* (1984), 46 C.P.C. 218 (Ont. H.C.), described *infra*, note 28.

General,[23] is by way of an ordinary action against the Attorney General. The "*Dyson* procedure", also used in Ontario, enjoys an obvious advantage over the petition of right in that no royal fiat was needed to institute an action against the Attorney General.[24]

With the abolition of the petition of right and of the requirement of the fiat in Ontario, there is no longer any advantage to the *Dyson* procedure. However, since the *Proceedings Against the Crown Act* does not expressly preclude other modes of suing the Crown, it is probable that the *Dyson* procedure survives and a declaration could still be obtained against the Crown in the right of Ontario in an action in which the Attorney General is named as the defendant.[25]

(iii) Interlocutory Declaration

A declaration is by its nature final.[26] For this reason, courts have generally refused to grant an interlocutory declaration prior to a final determination of the applicable law.[27] However, occasional exceptions have been made resulting from the fact that since an injunction is not available against the Crown, there is no other way of obtaining interlocutory relief against

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[23] [1911] 1 K.B. 410, 105 L.T. 753 (C.A.).

[24] Concern about the bypassing of the requirement of the fiat led to decisions that the *Dyson* procedure was available only where the Crown's rights were "indirectly" affected; where the Crown's rights were "directly" affected, it was said that the petition of right procedure had to be used: *Esquimalt and Nanaimo Railway Co. v. Wilson*, [1920] A.C. 358, [1918-19] All E.R. Rep. 836 (P.C., Can.) *Attorney-General of Ontario v. McLean Gold Mines*, [1927] A.C. 185, [1926] 4 D.L.R. 213 (P.C.); and *Calder v. A.-G. B.C.*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145. Outside Canada, this doctrine is less settled: Evans (ed.), *de Smith's Judicial Review of Administrative Action* (4th ed., 1980), at 480, treats it as a controversial question. If the *Dyson* procedure has survived the enactment of the *Proceedings Against the Crown Act* in Ontario, it is probably still limited to cases where Crown rights are only indirectly affected. If the *Dyson* procedure is to be abolished, this difficult distinction will disappear as well.

[25] This was the finding in *Canex Placer v. A.-G. B.C.* (1975), 58 D.L.R. (3d) 241, [1976] 1 W.W.R. 24 (B.C.C.A.), interpreting provisions identical to those of Ontario.

[26] *Inland Revenue Commissioners v. Rossminster*, [1980] A.C. 952, at 1027, [1980] 2 W.L.R. (H.L.).

[27] An interlocutory or interim declaration was refused on principle in the following cases: *Underhill v. Ministry of Food*, [1950] 1 All E.R. 591, 66 T.L.R. (Pt. 1) 730 (Ch. D.); *International General Electric Co. of New York Ltd. v. Commissioners of Customs and Excise*, [1962] Ch. 784, [1962] 3 W.L.R. 20 (C.A.); *Canadian Industrial Gas & Oil v. Government of Saskatchewan* (1974), 46 D.L.R. (3d) 314, [1974] 4 W.W.R. 557 (Sask. Q.B.); *Maclean v. Liquor Licence Board of Ontario* (1975), 9 O.R. (2d) 597, 61 D.L.R. (3d) 237 (Div. Ct.); *Gouriet v. Union of Postal Workers*, [1978] A.C. 435, [1977] 2 W.L.R. 310 (H.L.); *Meade v. Haringey London Borough Council*, [1979] 1 W.L.R. 637, [1979] 2 All E.R. 1016 (C.A.); *Inland Revenue Commissioners v. Rossminster*, *supra*, note 26.

the Crown.[28] While these cases may well have been wrongly decided in light of the long line of cases refusing to grant interlocutory or interim declarations, they do indicate that there is an occasional, imperative need for interlocutory relief against the Crown.

In view of the poor chance of success, it is remarkable how frequently plaintiffs have attempted to use the declaration as the vehicle to hold the Crown to the *status quo* pending the resolution of a legal dispute. Our recommendation that an injunction should be available against the Crown will ensure that interlocutory relief is available.[29]

(b) Recommendation

The procedure sanctioned in the *Dyson* case is a needless complication in the law. Declaration should be sought against the Crown itself, rather than against the Attorney-General, and it should make no difference whether Crown rights are directly or indirectly affected. Accordingly, we recommend that the *Dyson* procedure should be abolished.[30]

In other respects, since declaratory relief is available against the Crown, no change in the law is indicated.

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[28] Indeed, the various Crown Proceedings Acts, including the Ontario Act, that prohibit injunctive relief against the Crown go on to provide that "in lieu thereof" the court "may make an order declaratory of the rights of the parties": see, for example, Ontario, *supra*, note 2, s. 18. It is arguable that this provision simply substitutes the declaration for the injunction, and is not intended to preclude any category of relief: Zamir, *The Declaratory Judgment* (1962), at 311.

One of the exceptional cases is *Peralta v. Minister of Natural Resources*, *supra*, note 22, in which Ontario's Minister of Natural Resources, through his officials, continued to enforce fishing regulations that had been declared invalid by the Divisional Court. The Minister's justification was that, since the Divisional Court judgment was declaratory only, there was no compulsion to obey it pending the outcome of an appeal to the Court of Appeal. On application by the fishermen whose boats and catches were being seized by ministry officials, the High Court of Ontario granted an interim declaration against the Crown to the effect that the Minister had no authority to enforce the regulations pending the appeal. It should be noted that, in addition, interim injunctions were granted against individual officials, who could not invoke Crown immunity.

[29] The English Law Commission has recommended the amendment of s. 21 of the *Crown Proceedings Act, 1947*, *supra*, note 2, to expressly authorize an interim declaration: *Report on Remedies in Administrative Law* (Cmnd. 6407, 1976), para. 51.

[30] The abolition by the Ontario Legislature of the *Dyson* procedure would of course have no effect on proceedings against the Crown in right of Canada, and the *Dyson* procedure would survive for that purpose unless and until the federal Parliament made some different provision for review of federal legislation in the provincial superior courts.

5. APPLICATION FOR JUDICIAL REVIEW, MANDAMUS, PROHIBITION, AND CERTIORARI

(a) Application for Judicial Review

In Ontario, the prerogative writs of mandamus, prohibition, and certiorari have been replaced by a new procedure called an application for judicial review. The *Judicial Review Procedure Act*[31] provides that the court may make "an order in the nature of mandamus, prohibition or certiorari". The Act provides that an application for mandamus, prohibition or certiorari is deemed to be an application for judicial review.[32] This, in effect, abolishes the three remedies.[33]

However, although the Act makes some changes in the grounds upon which the three orders can be granted,[34] it otherwise makes no change in the substantive law governing the availability of the orders. The important point for our purposes is that the Act makes no provision respecting the amenability of the Crown to the three orders.[35] It is clear therefore that Crown immunity from mandamus, prohibition and certiorari, discussed below, is preserved by the Act.[36] However, as we shall see, the prerogative writ of *habeas corpus* is not affected by the *Judicial Review Procedure Act*, and continues to be available under the procedural and substantive rules in existence prior to the Act.

A declaration or an injunction can also be obtained in an application for judicial review,[37] as well as the ordinary Rules of Civil Procedure. However, the *Judicial Review Procedure Act* makes no provision regarding the amenability of the Crown to a declaration or injunction.[38] Whatever procedure is employed, the general substantive law continues to prevail. Accordingly, a declaration continues to be available, and an injunction continues to be unavailable, against the Crown in an application for judicial review.

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[31] R.S.O. 1980, c. 224, s. 2(1). For analysis of the Act, see Evans, *supra*, note 24, and Evans, Janisch, Mullan, and Risk, *Administrative Law* (3d ed., 1989), at 975-81.

[32] *Supra*, note 31, s. 7.

[33] But see Evans, Janisch, Mullan, Risk, *supra*, note 31, at 976-77, who identify some residual uses for the remedies.

[34] *Ibid*.

[35] As well as this omission, there is not even an express declaration that the Act binds the Crown.

[36] Evans, Janisch, Mullan, Risk, *supra*, note 31, at 842.

[37] *Judicial Review Procedure Act*, *supra*, note 31, ss. 2(1) and 8.

[38] *Ibid*. In certain circumstances, a declaration or injunction can also be obtained in an application under r. 14.05 of the Ontario Rules of Civil Procedure, O. Reg. 560/84.

(b) MANDAMUS

(i) Present Law

The prerogative writ of mandamus lies to compel the performance of a public duty.[39] At common law, a writ of mandamus will not lie against the Crown,[40] since the courts will not order the Crown to perform a public duty. The two reasons given for the immunity are now familiar: first, the courts were the Queen's courts and "there would be an incongruity in the Queen commanding herself",[41] and secondly, it would be impossible to punish a breach of the order by committing the Queen for contempt.[42]

The *Proceedings Against the Crown Act*[43] is silent on the availability of mandamus, thereby preserving the Crown's immunity. And, as indicated, the *Judicial Review Procedure Act*,[44] which requires an order in the nature of mandamus to be obtained in an application for judicial review, also preserves the Crown's immunity.[45]

(ii) *Persona Designata*

An order for mandamus will not lie against a Crown servant if the purpose of the order is actually to compel the performance of a duty owed by the Crown itself.[46] However, the courts have created an important exception to this rule of Crown immunity. If the statute imposing the public duty designates the particular servant who is to perform the duty, and thereby imposes the duty on the servant as *persona designata*, then mandamus will lie against the designated person.[47]

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[39] See, generally, Evans (ed.), *supra*, note 24, at 538-50.

[40] *R. v. Powell*, *supra*, note 7.

[41] *Ibid.*, at 361.

[42] *Ibid.*

[43] *Supra*, note 2. The same is true in all provinces in Canada, as well as in the United Kingdom.

[44] *Supra*, note 31.

[45] See discussion, *supra*, this ch., sec. 5(a).

[46] *Re Massey Manufacturing Co.* (1886), 13 O.A.R. 446; *Re Carey*, [1920] 3 W.W.R. 329 (B.C.S.C.); *Re Central Canada Potash*, [1973] 1 W.W.R. 193, (1972), 32 D.L.R. (3d) 107 (Sask. C.A.); and *Re Le Blanc* (1980), 6 Sask. R. 113, 117 D.L.R. (3d) 600 (Sask. C.A.).

[47] *Minister of Finance (B.C.) v. The King*, [1935] S.C.R. 278, [1935] 3 D.L.R. 316; *R. ex rel. Lee v. Workmen's Compensation Bd.*, [1942] 2 W.W.R. 129 (B.C.C.A.); *R. v. Leong Ba Chai*, [1954] S.C.R. 10, [1954] 1 D.L.R. 401; *Re McKay* (1973), 35 D.L.R. (3d) 627 (B.C.S.C.); *Re Simonson* (1975), 63 D.L.R. (3d) 560 (N.W.T.S.C.).

Where mandamus is sought against a Crown servant, it is a question of statutory interpretation whether the duty is owed by the Crown, or by the servant as a designated person. The courts have not been successful in establishing satisfactory rules by which to draw this crucial distinction, and the cases are difficult to reconcile. However, the general tendency appears to favour the *persona designata* alternative, which diminishes the scope of the Crown's immunity.[48]

(iii) Case for Reform and Recommendation

The Commission agrees with the view that "the immunity of the Crown from mandamus is a grave defect in the remedial law".[49] Despite the erosion of the Crown's immunity from mandamus as a result of the *persona designata* exception, the core of the immunity remains, defined by a body of law that is exceptionally vague and unpredictable.

For the reasons given in the earlier discussions of injunction and specific performance, the Commission is of the view that the Crown's immunity from mandamus should be abolished. We reiterate our belief that, as a matter of principle, the Crown ought to be treated like any other litigant, and that the full range of remedies should be available against the Crown. Again, we would hold this view even if an order against the Crown were ultimately unenforceable because, as a practical matter, instances of disobedience are bound to be exceedingly rare. Nevertheless, as we have indicated, the Commission recommends below that civil contempt should be available against the Crown and Crown servants to enforce an order binding the Crown.

The Crown's immunity from mandamus has been justified on the ground that "[t]he propriety of executive action or inaction raises questions suitable for political, not judicial, determination".[50] We believe that such a doctrine of judicial restraint has no place in this context. The breach of a peremptory duty to which the Crown has been subjected is, in our view, eminently suitable for judicial determination. Like injunctive relief and specific performance, mandamus is a discretionary remedy, and the courts can be trusted to consider matters of public interest or public policy invoked by the Crown to excuse its failure to comply with a statutory duty.

The Commission therefore recommends that the immunity of the Crown and its servants and agents from an order in the nature of mandamus under the *Judicial Review Procedure Act* should be abolished.[51]

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[48] Hogg, *supra*, note 1, at 34.

[49] *Ibid.*, at 13. See, also, the recommendation in the B.C. Report, *supra*, note 15, at 34.

[50] Strayer, "Injunctions against Crown Officers" (1964), 42 Can. B. Rev. 1, at 7.

[51] Draft Act, *supra*, note 16, s. 2(2)(d).

(c) Prohibition and Certiorari

(i) Present Law

The prerogative writ of prohibition lies to prohibit a tribunal from exceeding its jurisdiction.[52] The prerogative writ of certiorari lies to quash a decision made by a tribunal in excess of its jurisdiction.[53] The distinction between these two remedies is that prohibition must be invoked at an earlier stage in the proceedings than certiorari. In most other respects, the rules governing the two remedies are the same, and they are usually discussed together by commentators. As discussed, the *Judicial Review Procedure Act*,[54] which requires "an order in the nature of . . . prohibition or certiorari" to be obtained in an application for judicial review, has not altered the substantive rules regarding the persons against whom the two orders lie, and in particular has not altered the immunity of the Crown.[55]

The Crown is immune from prohibition and certiorari for the same reasons that the Crown is immune from injunction, specific performance and mandamus.[56] Unlike these other remedies, however, the Crown's immunity from prohibition and certiorari is of little practical importance. Prohibition and certiorari are available only against bodies that are under a duty to act judicially or at least to act fairly. Because they are usually sought against Crown servants, including ministers, when they are under a duty to act judicially,[57] there is generally no reason to seek them against the Crown itself. There is, however, one ill-defined complication where the decision of the Governor-General or Lieutenant-Governor in Council is sought to be reviewed, in which case prohibition and certiorari will not lie.[58]

(ii) Recommendation

Although the Crown's immunity from prohibition and certiorari is not of much practical importance, there seems to be no good reason for the preservation of the immunity. Accordingly, the Commission recommends

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[52] See, generally, Evans, *supra*, note 24, at 379-428.

[53] *Ibid*.

[54] *Supra*, note 31.

[55] See discussion, *supra*, this ch., sec. 5(a).

[56] See *supra*, this ch., sec. 3(a) and 5(b). See, also, Hogg, *supra*, note 1, at 22, 27, and 33, and Evans, *supra*, note 24, at 385.

[57] Hogg, *supra*, note 1, at 36.

[58] *Border Cities Press Club v. Attorney General of Ontario*, [1955] O.R. 14, [1955] 1 D.L.R. 405 (C.A.), and *Reynolds v. Attorney General* (1909), 29 N.Z.L.R. 24 (N.Z.C.A.).

that the Crown's immunity from an order in the nature of prohibition and certiorari under the *Judicial Review Procedure Act* should be abolished.[59]

6. HABEAS CORPUS

(a) PRESENT LAW

The prerogative writ of *habeas corpus* requires the person having control of a prisoner to bring the prisoner before the court, together with the cause of her detention, in order to enable the court to inquire into the legality of the detention.[60] If the cause of detention is legally sufficient, the court will return the prisoner to custody; if not, the court will release the prisoner.

There is no Crown immunity from *habeas corpus*, despite the fact that, like the other prerogative remedies, *habeas corpus* takes the form of a command by the Queen. The writ is directed to the person having control of the prisoner, for example, the governor of the prison. That person is very often a Crown servant, although in many cases the writ has been directed to a minister.[61] However, the person to whom the writ is directed is not necessarily *persona designata*, that is, specifically designated by statute to perform a particular public duty. But, because the respondent should be an individual with power to release the prisoner,[62] the writ should not be directed to the Crown itself.

In Ontario, the availability of the writ is governed by the *Habeas Corpus Act*,[63] a predominantly procedural measure, which says nothing about the Crown. Nor does the *Judicial Review Procedure Act*[64] deal with *habeas corpus*.

(b) RECOMMENDATION

Since there is no Crown immunity from *habeas corpus*, and in our view, no such immunity is desirable, no change in the law is indicated. It is vital to the effectiveness of the writ that it be available against ministers and

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[59] Draft Act, *supra*, note 16, s. 2(2)(d).

[60] See, generally, Evans, *supra*, note 24, at 596-603 and Sharpe, *The Law of Habeas Corpus* (1976).

[61] Sharpe, *ibid.*, at 171.

[62] In some cases the Crown itself has been named without objection as respondent in an application for habeas corpus: see, *The King v. Jeu Jang How* (1919), 59 S.C.R. 175, 50 D.L.R. 41; *Samejima v. The King*, [1932] S.C.R. 640, [1932] 4 D.L.R. 246; and *Vaaro v. The King*, [1933] S.C.R. 36, [1933] 1 D.L.R. 359.

[63] R.S.O. 1980, c. 193.

[64] *Supra*, note 21.

Crown servants, even when they are not *persona designata*. Since this is already the state of the law, no change is necessary.

Recommendations

The Commission makes the following recommendations:

1. Since damages are available against the Crown, no change in the law is needed or recommended.

2. The new *Crown Liability Act* should provide that the remedies of injunction and specific performance are available against the Crown.

3. The procedure for obtaining relief against the Crown by an action for a declaration against the Attorney General, known as the *Dyson* procedure, should be abolished.

4. The immunity of the Crown from orders in the nature of mandamus, prohibition, and certiorari under the *Judicial Review Procedure Act* should be abolished.

5. Since there is no Crown immunity from *habeas corpus*, and no such immunity is desirable, no change in the law is recommended.

CHAPTER 5

PROCEDURAL AND RELATED MATTERS: EVIDENCE, APPEALS, DISCOVERY, JURY TRIALS, AND LIMITATION OF ACTIONS

1. EVIDENCE

(a) Present Law

(i) Introduction

Crown privilege is a common law rule of evidence[1] which provides that oral or documentary evidence that is relevant and otherwise admissible must be excluded if its admission would be injurious to the public interest. Crown privilege is now sometimes called public interest immunity.

A claim of Crown privilege may be made in any proceedings, civil or criminal, before any court or tribunal, and at any stage of the proceedings. Where the Crown is a party to civil proceedings, the claim is most commonly made by the Crown during the process of discovery. Even where the Crown is not a party to proceedings, objections to the production of evidence on the ground of Crown privilege can be raised, either by the Crown, a private party, or a witness. If necessary, the Crown may intervene in the proceedings in order to raise such objections.[2] A claim of Crown privilege can also be raised by the court of its own motion. The claim is customarily supported by the affidavit or certificate of a minister asserting that the public interest would be injured by disclosure of the evidence.[3]

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[1] In the federal jurisdiction, the law is codified in the *Canada Evidence Act*, now R.S.C. 1985, c. C-5, ss. 37, 38, and 39 added by Schedule III of S.C. 1980-81-82-83, c. 111, repealing and replacing s. 41 of the *Federal Court Act*. The constitutionality of s. 41 was upheld in *Commission des droits de la personne v. Attorney-General for Canada*, [1982] 1 S.C.R. 215, 135 D.L.R. (3d) 17. In Quebec, the law is very briefly stated in article 308 of the Code of Civil Procedure: for discussion, see *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, 2 D.L.R. (4th) 193.

[2] In Ontario, intervention is governed by R. 13 of the Rules of Civil Procedure, O. Reg. 560/84.

[3] Hogg, *Liability of the Crown* (2d ed., 1989), at 41-43. In Ontario, the *Evidence Act*, R.S.O. 1980, c. 145, s. 30, authorizes a claim of Crown privilege to be made by "the deputy head or other officer of the ministry". Section 30 was invoked for a claim of Crown privilege in *Carey v. The Queen in Right of Ontario*, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161.

(ii) Judicial Review

In Ontario, it is clear that no document, class of documents, or other evidence, enjoys absolute immunity from admission in litigation.[4] Rather, it is for the court in which the claim is made to balance the injury to the public interest that would be caused by the admission of the evidence against the injury to the administration of justice that would be caused by the exclusion of the evidence.

The question of who bears the onus of proof in respect of this issue is also well settled in Canada. In *Carey v. The Queen in Right of Ontario*,[5] the Supreme Court of Canada unanimously rejected the approach of the English courts, which, in effect, placed the onus on the party seeking disclosure.[6] The court was of the view that the English approach imposed an impossible burden on a party who had never seen the documents.[7] It held instead that the presumption ought to be in favour of disclosure of all relevant documents, and that, in all cases, the burden of establishing policy reasons weighty enough to overcome the presumption should rest with the government.[8]

In determining a claim of Crown privilege, a court is not bound by the assertions in the minister's affidavit or certificate as to the injury to be expected from disclosure, nor as to the significance of the documents involved in the litigation. The court is entitled to inspect privately the documents for which privilege is claimed; indeed, the *Carey* decision indicates that where the minister's affidavit or certificate does not make clear that the public interest is best served by confidentiality, the court *should* inspect the evidence.[9]

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[4] *Carey v. The Queen in Right of Ontario*, *supra*, note 3, at 637.

[5] *Supra*, note 3.

[6] In the English case of *Air Canada v. Secretary of State for Trade (No. 2)*, [1983] 2 A.C. 394, [1983] 2 W.L.R. 494 (H.L.), the House of Lords held that a party seeking production of documents for which Crown privilege has been claimed must establish that the documents would be of assistance in proving that party's case.

[7] *Carey v. The Queen in Right of Ontario*, *supra*, note 3, at 678.

[8] *Ibid.*, at 681-683, following *Fletcher Timber v. Attorney-General*, [1984] 1 N.Z.L.R. 290 (C.A.).

[9] In *Carey*, *supra*, note 3, the lower courts had, without inspection, given effect to a minister's certificate of Crown privilege in respect of provincial cabinet documents. The Supreme Court of Canada held that, having regard to the government's burden of proof, the certificate did not make out a clear enough case for confidentiality. The court remitted the issue to the trial judge to inspect the documents in private, and then to decide whether the documents should be produced.

(iii) Claims with Respect to a "Class" of Documents

A document whose particular contents are innocuous may nevertheless be protected from disclosure by Crown privilege if it belongs to a "class" of documents that should be kept secret. For example, a non-controversial memorandum within the Department of External Affairs, forming part of a file of documents relating to the conduct of recent international negotiations, might be subject to a claim of Crown privilege.

Prior to *Carey*, cabinet documents were considered to constitute a class that enjoyed an absolute immunity from production.[10] In *Carey*,[11] the issue arose whether the Crown could claim Crown privilege for all documents that went to or came from the cabinet and cabinet committees.[12] The claim in that case was based, not on the actual contents of the documents, which were not revealed, but on the alleged need for confidentiality of cabinet documents as a class. The Crown argued that disclosure of cabinet documents would prejudice the candour and completeness of future cabinet deliberations.

The Supreme Court of Canada rejected this argument, holding that, although this concern was a relevant factor for the court to consider in determining the claim of Crown privilege, it was not a sufficient reason to justify a refusal of disclosure. Other factors to be considered in favour of allowing the claim of Crown privilege included the sensitivity of the issue under discussion, the contents of the documents, and the time that had elapsed since the creation of the documents. On the other side of the scale, a factor favouring disclosure would be the importance of the documents to the litigation.[13] The court held that, on the facts of *Carey*, these factors could be properly assessed only after inspection of the documents, and remitted the issue to the trial court.[14]

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[10] *Conway v. Rimmer*, [1968] A.C. 910, at 952, [1968] 2 W.L.R. 998 (H.L.).

[11] *Supra*, note 3.

[12] The Crown was the defendant in an action for breach of contract arising out of the Crown's acquisition of a tourist lodge which had been the subject of Cabinet consideration.

[13] *Supra*, note 3, at 670-71.

[14] The *Carey* case makes clear that in Canada, at common law, cabinet documents are no longer a privileged class. However, s. 39 of the *Canada Evidence Act*, *supra*, note 1, makes unreviewable a claim of Crown privilege in respect of "a confidence of the Queen's Privy Council for Canada".

See, also *Gloucester Properties Ltd. v. The Queen in Right of British Columbia* (1981), 129 D.L.R. (3d) 275, [1981] 4 W.W.R. 179 (B.C.C.A.). *Carey* is consistent with decisions of the highest courts in England: *Burmah Oil Co. Ltd. v. Bank of England*, [1980] A.C. 1090, [1979] 1 W.L.R. 473 (H.L.), and *Air Canada v. Secretary of State for Trade*, *supra*, note 6. It also accords with the position in Australia and New Zealand: *Sankey v. Whitlam* (1978), 142 C.L.R. 1, 29 F.L.R. 346; *Environmental Defence Society v. South Pacific Aluminum*, [1981] 1 N.Z.L.R. 153 (C.A.); and *Fletcher Timber v. Attorney-General*, *supra*,

The court in *Carey* acknowledged nevertheless that a class claim of privilege might still be upheld if it were made in respect of a sub-class of cabinet documents that shared a common characteristic that plainly called for secrecy, for example, where the documents dealt with "national security" or "diplomatic relations".[15] However, the documents in *Carey*, which concerned the acquisition of a tourist lodge in northern Ontario, did not fall into such a sub-class. Indeed, the court described them as "hardly world-shaking".[16]

(iv) Statutory Provisions Affecting Crown Privilege

a. Proceedings Against the Crown Act, Section 12(a)

Section 12 of Ontario's *Proceedings Against the Crown Act* makes the rules regarding discovery applicable in proceedings against the Crown as if it were a corporation, subject to three exceptions. The first exception recognizes the doctrine of Crown privilege and is therefore relevant here. Section 12(a) provides:

> (a) the Crown may refuse to produce a document or to answer a question on the ground that the production or answer would be injurious to the public interest; . . .

Section 12(a) is more limited than the common law in a number of ways. Section 12(a) says nothing about judicial review, although it is now clear that judicial review is available.[17] Section 12(a) applies only to proceedings *against* the Crown, and only to the discovery stage of those proceedings. Moreover, it confers the right to claim the privilege only on the Crown.

b. Evidence Act, Section 30

A second Ontario provision dealing with Crown privilege is section 30 of the *Evidence Act*,[18] which provides as follows:[19]

> 30. Where a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a ministry of the public

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note 8. The law of executive privilege in the United States is also similar: see *United States v. Nixon*, 418 U.S. 704, 98 S. Ct. 3090 (1974).

[15] *Supra*, note 3, at 671.

[16] *Ibid.*, 672.

[17] *Carey v. The Queen in Right of Ontario*, *supra*, note 3.

[18] R.S.O. 1980, c. 145.

[19] In *Carey v. The Queen in Right of Ontario*, *supra*, note 3, at 642, the certificate claiming

> service of Ontario, if the deputy head or other officer of the ministry has the document in his personal possession, and is called as a witness, he is entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the ministry, to object to producing the document on the ground that it is privileged, and such objection may be taken by him in the same manner, and has the same effect, as if such member of the Executive Council or head of the ministry were personally present and made the objection.

The provision is silent about judicial review, which is governed by the common law.

c. *Confidentiality Provisions*

There are many provisions in Ontario statutes that expressly make information confidential. For example, information received in the course of a public official's duties is often prohibited from disclosure,[20] as are certain reports made under statutory authority.[21] Confidentiality provisions that do not make specific reference to the introduction of evidence in court may be construed as not barring oral testimony or the production of documents in court.[22] Of course, a claim of Crown privilege could be made in respect of material covered by a confidentiality clause; however, the court would still have to decide the issue by balancing competing public interests, as it does with other claims.

There are also some statutory provisions that prohibit testimony in court about matters learned in the course of a public official's duties,[23] and there are a few statutes that prohibit the production of documents in court.[24] The Commission has not assessed the need for these numerous and varied confidentiality provisions since, as we discuss in the next section,

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Crown privilege was given by a senior official, invoking s. 30 of the *Evidence Act*. The court remitted the claim to the trial judge to inspect the documents and decide whether or not to uphold the claim.

[20] For example, see *Building Code Act*, R.S.O. 1980, c. 51, s. 23(1), and *Fuel Tax Act*, S.O. 1981, c. 59, s. 22(1).

[21] For example, see *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c. 108, s. 51(3), and *Education Act*, R.S.O. 1980, c. 129, s. 237(10).

[22] This appears to have been the view of the judge at first instance in *R. v. Homestake Mining Co.*, [1977] 3 W.W.R. 629, 76 D.L.R. (3d) 521 (Sask. C.A.). The Court of Appeal held the evidence in question to be admissible on other grounds. Bushnell, "Crown Privilege" (1973), 51 Can. B. Rev. 551, at 552-55 discusses the effect of confidentiality clauses.

[23] For example, see *Liquor Licence Act*, R.S.O. 1980, c. 244, s. 24(2), and *Ontario Energy Board Act*, R.S.O. 1980, c. 332, s. 6(1).

[24] For example, see *Professional Engineers Act, 1984*, S.O. 1984, c. 13, s. 39(2), and *Workers' Compensation Act*, R.S.O. 1980, c. 539, s. 85(1).

that task is being undertaken by the Standing Committee on Procedural Affairs of the Ontario Legislature.

d. Freedom of Information and Protection of Privacy Act, 1987

Ontario's *Freedom of Information and Protection of Privacy Act, 1987*[25] provides for public access to government documents, subject to numerous exceptions. Section 67(2) provides that the Act "prevails over a confidentiality provision in any other Act unless the other Act specifically provides otherwise". Section 67(1) directs the Standing Committee on Procedural Affairs to "undertake a comprehensive review of all confidentiality provisions" in Ontario Acts, and to make recommendations with respect to the repeal or amendment of provisions that are inconsistent with the purposes of the Act. The Act, by section 71, binds the Crown.

The *Freedom of Information and Protection of Privacy Act, 1987* has no direct effect on the doctrine of Crown privilege. The fact that a document is not accessible under the Act, because it falls within one of the exceptions, does not mean that the document is necessarily entitled to Crown privilege in litigation. Section 64 of the Act "does not impose any limitation on the information otherwise available by law to a party in litigation", and "does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document".

While the *Freedom of Information and Protection of Privacy Act, 1987* has no direct effect on the doctrine of Crown privilege, it is clear that Crown privilege could never be claimed successfully for a document that was accessible under the Act. In that way, the Act may well constrain future claims of Crown privilege.

(b) The Law in Other Jurisdictions

(i) Federal Legislation

The Parliament of Canada has attempted to enact a comprehensive code of Crown privilege.[26] Sections 37, 38 and 39 of the *Canada Evidence Act*,[27] govern claims of Crown privilege; these sections, which are long and complicated, distinguish between three categories of claim. First, section 37 of the Act establishes a general residual category that is subject to judicial review, and provides rules as to which court should determine such claims. Secondly, section 38 provides that claims of Crown privilege based on injury

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[25] S.O. 1987, c. 25.

[26] Quebec's Code of Civil Procedure, R.S.Q. 1977, c. 25, s. 308, is a brief statement of the rule.

[27] *Supra*, note 1.

to "international relations or national defence or security" are reviewable by the Chief Justice of the Federal Court "or such other judge of that court as the Chief Justice may designate". Thirdly, section 39 provides that claims of Crown privilege for "a confidence of the Queen's Privy Council for Canada" remain unreviewable.

Sections 37 to 39 of the *Canada Evidence Act* are substantially more restrictive than the current state of the common law, particularly in making cabinet documents an unreviewable class. As the Supreme Court of Canada emphasized in *Carey*,[28] cabinet documents vary immensely in their sensitivity. The court was of the view that courts can be trusted to determine claims of Crown privilege in ways that do not yield injurious disclosures of secret information. By contrast, the long history of litigation regarding Crown privilege suggests that not all ministers can be trusted to make claims of Crown privilege that are no broader than is strictly necessary.[29]

(ii) Law Reform Commission of British Columbia

The Law Reform Commission of British Columbia in its *Report on Legal Position of the Crown* (1972)[30] recommended that the court should have power in every case to review a claim of Crown privilege. This recommendation has been implemented by section 9 of the British Columbia *Crown Proceedings Act*,[31] which provides that judicial review is available with respect to all claims of Crown privilege,[32] and expressly requires the court to balance the competing public interests in reviewing such claims. Section 9 also authorizes the court to order disclosure, subject to such "conditions or restrictions it considers appropriate".

(iii) Law Reform Commission of Canada

The Law Reform Commission of Canada, in its *Report on Evidence* (1977),[33] also recommended that all claims of Crown privilege should be

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[28] *Supra*, note 3, at 670-74.

[29] For example, in *Ellis v. Home Office*, [1953] 2 Q.B. 135, [1953] 3 W.L.R. 105 (C.A.), in which, following *Duncan v. Cammell Laird & Co. Ltd.*, [1942] A.C. 624, [1942] 1 All E.R. 587 (H.L.) the court accepted as conclusive a ministerial claim of Crown privilege for reports on a prisoner that would have disclosed whether or not the prison authorities, who were being sued for negligence, were aware of the prisoner's violent tendencies. The court regretted its inability to review the claim, repeating (at 137) the trial judge's "uneasy feeling that justice may not have been done".

[30] British Columbia Law Reform Commission, *Report on Legal Position of the Crown* (1972) (hereinafter referred to as the "B.C. Report").

[31] R.S.B.C. 1979, c. 86.

[32] Although s. 9 refers to "an inquiry" rather than inspection of documents.

[33] Law Reform Commission of Canada, *Report on Evidence* (1977). The Crown privilege recommendations are contained in ss. 43 and 44 of the proposed statute, and are discussed at pp. 82-83 of the Report.

reviewable. However, it recommended that, if the Crown or a party so request, claims relating to "national defence or security, the international relations of Canada, federal-provincial relations, or matters of confidence of the Queen's Privy Council for Canada" should be referred "to the Chief Justice of Canada, who shall designate a judge of the Supreme Court of Canada to determine the matter". The Commission also recommended that the court should stay proceedings pending such a determination. The rationale given for this rather cumbersome procedure was that the more sensitive the material the more senior the judge who should examine the material.

(iv) Federal/Provincial Task Force

The Federal/Provincial Task Force on Uniform Rules of Evidence has also recommended that all claims of Crown privilege should be subject to judicial review.[34] The Task Force further recommended that only the Attorney General, or the Deputy Attorney General, should be authorized to assert a claim of Crown privilege, which it believed would be made more consistently and with more restraint than would occur if each Minister was left with a free hand to advance such claims.[35] A claim of Crown privilege would be in the form of a certificate rather than an affidavit, so that the Attorney General would not be exposed to cross-examination.[36] In order to give guidance to the Attorney General, and to the reviewing court, the Task Force also recommended that the statute should prescribe the factors to be taken into account in deciding such a claim.[37]

The *Uniform Evidence Act, 1981*[38] generally follows the recommendations of the Task Force with respect to Crown privilege, with one crucial exception. Section 168(1)(a) of the Act makes a claim of Crown Privilege unreviewable if it is based on "high policy", which is defined as international relations, national defence or security, a confidence of the cabinet, or confidential law enforcement information.[39] This provision creates a substantial

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[34] Uniform Law Conference of Canada, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982), ch. 34. The report was submitted for consideration by the Uniform Law Conference of Canada in spring, 1981.

[35] *Ibid.*, at 458-59.

[36] *Ibid.*, at 460.

[37] These factors included, *ibid.*: the reasons given for non-disclosure; the nature of the information sought; the age and current relevance of the information; the nature of the proceedings in which the claim arises; the necessity and relevance of the information in the proceeding; the harm or injury to the state and to the party seeking disclosure, respectively; the extent to which the information has been circulated both inside and outside government; and any other factor considered by the Attorney General (or the Deputy) in deciding to claim Crown privilege.

[38] Uniform Law Conference of Canada, *Proceedings of the Sixty-Third Annual Meeting* (1981), Appendix U, *Uniform Evidence Act, 1981*.

[39] *Ibid.*, s. 165.

body of unreviewable claims, contrary to the recommendation of the Task Force. The Uniform Act has not been enacted by the federal Parliament or by any province.[40]

(c) Case for Reform and Recommendations

In Ontario, all claims of Crown privilege are reviewable by the court, whose role it is to balance the public interest in confidentiality against the public interest in the administration of justice. In the Commission's view, the common law rule of Crown privilege as established in *Carey v. The Queen in Right of Ontario*[41] is generally satisfactory and need not be altered. However, for greater certainty, we recommend that the rule should be expressly included as a part of a new *Crown Liability Act*. The statutory provision should provide that, where Crown privilege is claimed with respect to any evidence, documentary or otherwise, the court may examine the evidence. The court should allow disclosure of the evidence, unless it is satisfied that the injury to the public interest that would be caused by disclosure would outweigh the injury to the administration of justice that would be caused by withholding the evidence.

The Commission has considered whether the statute should include a list of factors to be considered by the court in making its determination of a claim of Crown privilege. As we have indicated, the *Uniform Evidence Act, 1981* provides such a list.[42] However, we believe that a list of factors adds little to the kinds of matters that the parties would naturally raise, and the court of its own motion would consider, in such an application. Moreover, the inclusion of any statutory list inevitably raises the possibility of its mechanical application, thereby deflecting a more thoughtful, flexible evaluation of the relevant factors in a particular case. On balance, we do not regard a list of factors to be necessary or useful.

With respect to the court's review, we recommend that the proposed Act should provide that the court has the power to inspect privately the evidence for which Crown privilege is claimed. We further recommend that, in the appropriate circumstances, the court should be entitled to order limited disclosure, subject to such terms and conditions as it deems necessary.

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[40] We should also point out that in our *Report on the Law of Evidence* (1976), at 221-33, this Commission examined the law of Crown privilege. At that time, the Commission recommended that where a Minister certified that disclosure would be injurious to the security of Canada or Ontario or to federal-provincial relations, or that it would disclose a confidence of the Executive Council, disclosure should be refused without any examination by the court. With respect to these unreviewable claims, a ministerial certificate should assert that "the Executive Council", and not just a single Minister, was of the opinion that disclosure would be contrary to the public interest. As we have indicated, the Commission's recommendations have been overtaken by the development of the common law, a development with which the Commission now fully agrees.

[41] *Supra*, note 3.

[42] *Supra*, note 38, s. 170.

Subject to the question of appeals from an order of disclosure, to be discussed in the next section, we do not think it necessary to make any recommendation regarding the procedure or form that a claim of Crown privilege should take. In our view, questions, such as whether the claim should take the form of an affidavit or certificate, can be properly left to the judgment of the court.

As to general questions of procedure, claims of Crown privilege should be made and disposed of in the same manner as other evidentiary issues in litigation. However, as we discuss more fully below in the context of discovery,[43] section 12 of the *Proceedings Against the Crown Act*, which relates to the issues of disclosure and privilege, is unsatisfactory and in our view should be repealed.

2. APPEALS WITH RESPECT TO CROWN PRIVILEGE

Appeals from a decision of a court that rejects a claim of Crown privilege raise a difficult issue to which we now turn. Where a claim of Crown privilege is rejected by the court, the consequences of an erroneous decision can be serious, because disclosure of evidence that should be kept confidential in the public interest may cause injury to the public interest.

The simple answer to concerns about erroneous disclosure of such evidence might appear to be to allow the Crown to appeal immediately any order requiring disclosure of evidence for which a claim of Crown privilege is made. Indeed, an immediate right of appeal is currently available where the claim of Crown privilege is raised *prior* to trial, either during the discovery process,[44] or upon service of a *subpoena duces tecum*, which requires a person in possession of documents to produce them at trial.[45]

However, where a claim of Crown privilege is raised in the course of a trial, the court's determination is considered interlocutory and no immediate appeal is available.[46] The policy underlying this rule is a practical one. An immediate appeal gives rise to interruption and delay of the trial until final disposition of the appeal. Not only does such delay result in increased cost to the parties, but the potential for delay can be subject to tactical abuse. For these reasons, interlocutory rulings, including determinations of claims of privilege, are subject to appeal following the judgment of the court like any other matter relating to the trial.

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[43] *Infra*, this ch., sec. 3(b).

[44] Rules of Civil Procedure, O. Reg. 500/84, rr. 62.01, and 62.02.

[45] *Carey v. The Queen in Right of Ontario*, *supra*, note 3, at 642-46, such a subpoena had been issued for the production of documents for which Crown privilege is claimed. The Crown applied to quash the subpoena, and successive appeals were taken from the disposition of that application.

[46] See *R. v. Snider*, [1954] S.C.R. 479, [1954] C.T.C. 1129.

It should be noted that in civil proceedings in Ontario, where an order to produce documents or give testimony is made against a *non-party*, the order is considered final rather than interlocutory.[47] Unlike interlocutory orders, a final order is immediately appealable, even if made in mid-trial. Therefore, where the Crown is not a party to the action, and a claim of Crown privilege is rejected during a trial, the Crown would arguably be entitled bring an immediate appeal from that ruling.[48]

However, the fact that an immediate appeal may be available where the Crown is a non-party does not necessarily argue for an immediate appeal where the Crown is a party. It goes without saying that any concern about using appeals for tactical delay is much reduced where the Crown is not a party and therefore unlikely to derive any benefit from delay. At any rate, there is *dictum* from the Ontario Court of Appeal that indicates that an immediate right of appeal may not arise in every case where the Crown is a non-party.[49]

We have considered whether our concern for the consequences of interruption or delay could be addressed by providing an expedited process of appeal. However, we have decided that the provision of any appeal process during the trial would invariably involve certain delays and costs.

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[47] *Guaranty Trust Co. v. Fleming*, [1946] O.R. 817, [1947] D.L.R. 184 (C.A.), and *Smerchanski v. Lewis* (1980), 30 O.R. (2d) 370, 117 D.L.R. (3d) (C.A.). See, also, Watson, "Finality and Civil Appeals – A Canadian Perspective" (1984), 47(3) Law & Contemp. Probs. 1, at 11-13. The argument of finality runs as follows. If a stranger to the action is ordered to produce documents, the decision is final so far as the stranger is concerned, and the stranger ought to have an immediate right of appeal. Otherwise, the stranger will never have any way of challenging a ruling that may have a serious impact on her.

[48] As Watson, *supra*, note 47, observes, at 12, where the ruling goes the other way, so that it is the party (rather than the non-party witness) that is aggrieved, there is no reason to treat the order as final. As well, since there is no disclosure, no injury to the public interest has been caused. However, in *Smerchanski v. Lewis*, *supra*, note 47, at 377-78, Arnup J.A. for the court held that where an objection to produce documents on the ground of Crown privilege is made by a stranger to the action, the judge's order is final, and therefore appealable even if the objection is upheld and no order to produce is made.

In *Homestake Mining Co. v. Texasgulf Potash Co.*, *supra*, note 22, the (non-party) Crown was permitted to appeal from a denial of a Crown privilege claim made in the course of a trial. In Saskatchewan, as in Ontario, there was no right of appeal of an interlocutory order made in the course of the trial. But Culliton C.J.S. for the court pointed out, at 524-25, that the Crown, though not a party, "has a right to raise the question of Crown privilege", and therefore "has a right to have that question finally settled before disclosure is made". He concluded that: "[t]his would necessitate the right of appeal".

[49] In *Smerchanski v. Lewis*, *supra*, note 47, the trial judge had quashed two subpoenas; this decision was clearly an "order". Arnup J.A. indicated, *obiter* at 373, that, if the judge had "ignored the subpoenas and given a ruling that the evidence sought to be introduced was inadmissible", then "it could be strongly argued that his decision was of the same nature as any other ruling on evidence or the conduct of the trial, not subject to appeal itself".

In the end, we have concluded that concerns about interruptions and delays in the trial outweigh the concern for the very occasional possibility of disclosure of evidence for which Crown privilege should have been granted. We feel confident that the probability that a claim of Crown privilege will arise for the first time at trial is exceedingly small, given the current extensive disclosure requirements of the discovery process, and the various penalties for non-disclosure of relevant information. Moreover, we should emphasize that, not only will these thorny cases be rare, but any potential damage from release of sensitive material can be reduced to a minimum by our recommendation that the court may order limited disclosure, subject to terms or conditions.[50]

3. DISCOVERY

(a) Present Law

At common law, the Crown was immune from discovery. The reason originally given for the immunity was the mundane one that the Crown could not swear an affidavit of documents.[51] However, later cases assumed that the immunity flowed from the Crown's prerogative.[52]

The Crown could refuse to give discovery even though it could itself obtain discovery against another party.[53] This was so even where the Crown had initiated the proceedings.[54] The courts did not accept the argument, successfully made in other contexts,[55] that the burden involved in a procedure should fall on the Crown where, as plaintiff, it has invoked the benefit of that procedure.[56]

In Ontario, section 12 of the *Proceedings Against the Crown Act* now governs disclosure by the Crown. Section 12 provides:[57]

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[50] *Supra*, this ch., sec. 1(c).

[51] *Thomas v. The Queen* (1874), L.R. 10 Q.B. 4, 23 W.R. 345 (Q.B.).

[52] *Attorney-General v. Corporation of Newcastle-upon-Tyne*, [1897] 2 Q.B. 384, at 395, [1895-99] All E.R. Rep. 747 (C.A.); *Commonwealth v. Miller* (1910), C.L.R. 742, at 745, 16 A.L.R. 424 (H.C. Aust.); and *Crombie v. The King* (1922), 52 O.L.R. 72, [1923] 2 D.L.R. 542 (A.D.).

[53] *A.-G. v. Newcastle-upon-Tyne Corp.*, *supra*, note 52, at 395.

[54] *Central Canada Potash Co. Ltd. v. Attorney-General of Saskatchewan* (1974), 50 D.L.R. (3d) 560, [1974] 6 W.W.R. 374 (Sask. C.A.).

[55] See discussion *infra*, ch. 7, sec. 2(d).

[56] "The right to withhold discovery is a prerogative of the Crown which it does not relinquish by instituting litigation": *Attorney-General for Ontario v. Toronto Junction Recreation Club* (1904), 8 O.L.R. 440, at 442, 40 W.R. 72 (H.C.J.).

[57] By contrast, s. 11 of the *Uniform Evidence Act*, *supra*, note 38, simply provides that the rules of procedure regarding discovery "apply in the same manner as if the Crown were

12. In proceedings against the Crown, the rules of the court in which the proceedings are pending as to discovery and inspection of documents and examination for discovery apply in the same manner as if the Crown were a corporation, except that,

(a) the Crown may refuse to produce a document or to answer a question on the ground that the production or answer would be injurious to the public interest;

(b) the person who shall attend to be examined for discovery shall be an official designated by the Deputy Attorney General; and

(c) the Crown is not required to deliver an affidavit on production of documents for discovery and inspection, but a list of the documents that the Crown may be required to produce, signed by the Deputy Attorney General, shall be delivered.

(b) Case for Reform and Recommendation

In our view, section 12 of the *Proceedings Against the Crown Act* is deficient in a number of significant respects. First, section 12(a) contains what we regard to be a completely unsatisfactory statement of Crown privilege. Not only does it fail to acknowledge the existence of judicial review, but it is entirely misplaced in section 12. The doctrine of Crown privilege is not confined to the discovery process, and should not be included in the discovery provision of the Act. However, this concern has already been addressed by the Commission's earlier recommendation that a new *Crown Liability Act* should contain an express statement of the rule governing claims of Crown privilege.[58]

Our second criticism is that section 12 applies only in "proceedings *against* the Crown", defined in section 1(d) of the Act as follows:

> proceedings against the Crown includes a claim by way of set-off or counterclaim raised in proceedings by the Crown and includes interpleader proceedings to which the Crown is a party.

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a corporation". Ontario itself initially adopted the discovery section of the *Uniform Evidence Act*: S.O. 1963, c. 109, s. 10. But in 1965 the discovery section was repealed and replaced by the present s. 12: S.O. 1965, c. 104, s. 2. The Commission has not been able to discover the reason for the change. See, also, British Columbia, *Crown Proceeding Act*, R.S.B.C. 1979, c. 86; Alberta, *Proceedings Against the Crown Act*, R.S.A. 1980, c. P-18; Saskatchewan, *The Proceedings Against the Crown Act*, R.S.S. 1978, c. P-7; Manitoba, *Proceedings Against the Crown Act*, R.S.M. 1987, c. P-140; Ontario, *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393; Quebec, Code of Civil Procedure, R.S.Q. 1977, c. C-25; New Brunswick, *Proceedings Against the Crown Act*, R.S.N.B. 1973, c. P-18; Nova Scotia, *Proceedings Against the Crown Act*, R.S.N.S. 1967, c. 239; Prince Edward Island, *Crown Proceedings Act*, R.S.P.E.I. 1974, c. C-31; Newfoundland, *Proceedings Against the Crown Act*, S.N. 1973, c. 59; and United Kingdom, *Crown Proceedings Act, 1947*, 10 & 11 Geo. 6, c. 44.

[58] *Supra*, this ch., sec. 1(c).

The definition does not include proceedings brought by the Crown as plaintiff, nor proceedings to which the Crown is not a party at all.

Our third concern is that section 12(b) of the *Proceedings Against the Crown Act* confers on the Deputy Attorney General the power to designate the person who shall attend to be examined for discovery.[59] This is the reverse of the rule for discovery against corporations, by which it is the party seeking discovery from the corporation who designates the representative to be examined, subject to the corporation's right to apply to the court for an order of substitution.[60] Under section 12(b), the court does not even have the power to substitute someone other than the person designated by the Deputy Attorney General.[61] If the Deputy Attorney General were to designate a representative with little knowledge of the relevant facts, the plaintiff could do nothing about it. Ontario is the only jurisdiction in Canada where the Crown designates the person to be examined without any judicial power of substitution.

Finally, pursuant to section 12(c) of the *Proceedings Against the Crown Act*, the Crown is not required to deliver an affidavit of documents, but merely "a list of the documents that the Crown may be required to produce". Our concern with this provision is twofold. First, we see no reason why the Crown should not have to disclose documents under the oath of a representative, who would then be subject to cross-examination on her affidavit.

Secondly, the language of section 12(b), which refers to "the documents that the Crown may be required to produce", implies that the list need not include documents for which the Crown claims privilege. Under ordinary rules of practice, an affidavit of documents must indicate documents that ultimately will not be produced on account of privilege.[62] This disclosure is important to a party seeking discovery because it at least learns of the existence of documents that are being withheld, and can then challenge the claim of privilege. Although the withholding of documents on the

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[59] By contrast, seven Canadian provinces have assimilated the Crown to a corporation for discovery purposes, allowing the party seeking discovery to designate: B.C., *supra*, note 57, s. 9; Alta., *supra*, note 57, s. 11; Sask., *supra*, note 57, s. 13; N.B., *supra*, note 57, s. 10; N.S., *supra*, note 57, s. 10; P.E.I., *supra*, note 57, s. 10; Nfld., *supra*, note 57, s. 11. Manitoba, on the other hand, provides that the Crown (the Attorney General) is to designate the official who is to be examined; however, the court has the power to designate a different official: Man., *Proceeding Against the Crown Act*, R.S.M. 1987, c. P-150, s. 9. There seems to be no such provision in Quebec. The rules applicable to proceedings against the federal Crown are essentially the same as those in Manitoba: Federal Court Rules, C.R.C. 1978, r. 465(1)(c); for an analysis, see *Irish Shipping Ltd. v. The Queen*, [1974] 1 F.C. 445 (T.D.), and *Smith v. The Queen*, [1981] C.T.C. 476, 81 D.T.C. 5351 (F.C.T.D.).

[60] Rules of Civil Procedure, *supra*, note 2, r. 31.03(2).

[61] *Ibid.*

[62] *Ibid.*

ground of Crown privilege is subject to judicial review,[63] this amounts to a weak protection against unjustified claims of Crown privilege if the adverse party has no way of discovering the very existence of documents that the Crown claims to be privileged.

In our view, the simplest and best solution to all these concerns would be to subject the Crown to the same discovery rule as a corporation. Accordingly, we recommend that section 12 of the *Proceedings Against the Crown Act* should be repealed, and that the Crown should be liable to give discovery to the same extent and in the same manner as if the Crown were a corporation.

4. JURY TRIALS

(a) PRESENT LAW

Section 15 of the *Proceedings Against the Crown Act*[64] prohibits jury trials in proceedings against the Crown. The rationale for this prohibition is obscure but it may be responsive to a concern that a jury might be more sympathetically disposed to a plaintiff where the Crown is defendant, because of the Crown's obvious ability to satisfy a judgment against it.[65]

(b) RECOMMENDATION

In our view, concern that juries may make unjustified awards against the Crown, on the basis that the Crown constitutes a "deep pocket" for recovery by an injured plaintiff, is an insufficient reason to deny an injured person the right to have a matter determined by a jury. We need only point out that there are many other "deep pocket" defendants, particularly large corporations, who are subject to the process of trial by jury. We see no persuasive reason to treat the Crown differently than such persons, and accordingly, we recommend that section 15 of the *The Proceedings Against the Crown Act* should be abolished.

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[63] See discussion, this ch., s. 1(a).

[64] R.S.O. 1980, c. 393.

[65] The British Columbia Law Reform Commission surmised as much: B.C. Report, *supra*, note 30, at 39.

5. LIMITATION OF ACTIONS

(a) PRESENT LAW

(i) Introduction

At common law, statutes of limitation do not bind the Crown. Where the Crown commences proceedings outside the applicable limitation period, a defendant is not permitted to plead the statute of limitation.[66]

Although the Crown, as plaintiff, is not bound by statutes of limitation, the Crown, as defendant, can nevertheless take advantage of limitation periods.[67] As we discuss more fully below, this asymmetrical and unfair result obtains because the common law presumption that the Crown is not bound by a statute applies only when the statute would operate to the prejudice of the Crown. There is no presumption that a statute conferring a benefit does not apply to the Crown.[68]

In Ontario, the common law rule of Crown immunity from limitation provisions has been mainly supplanted by statute, as it has in all other jurisdictions of Canada, and in Australia, New Zealand and the United Kingdom.[69] Nevertheless, there remain some residual areas of common law immunity.

(ii) Special Limitation Periods

In Ontario, section 11(1) of the *Public Authorities Protection Act*[70] imposes a special limitation period of six months on an action "against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority". This limitation period applies to actions against the Crown and Crown agents,[71] as well as to other public bodies, such as school boards, police commissions and harbour commissions. The effect of such a short period of limitation is to bar many actions against public authorities.[72]

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[66] *Attorney-General for Ontario v. Watkins* (1975), 8 O.R. (2d) 513, 58 D.L.R. (3d) (C.A.).

[67] *Attorney-General for Ontario v. Palmer* (1980), 28 O.R. (2d) 35, 108 D.L.R. (3d) 349 (C.A.).

[68] See *infra*, ch. 7.

[69] In most jurisdictions, the principal statutes of limitations now contain express words binding the Crown, or are made binding by a provision of the relevant Crown proceedings statute.

[70] R.S.O 1980, c. 406.

[71] See, for example, *Attorney-General for Ontario v. Palmer*, *supra*, note 67; *Schenck v. The Queen in Right of Ontario*, [1987] 2 S.C.R. 289, 50 D.L.R. (4th) 384; *Mirhadizadeh v. The Queen in Right of Ontario* (1986), 57 O.R. (2d) 441 (H.C.J.); and *Peaker v. Canada Post Corp.* (1989), 68 O.R. (2d) 8.

[72] A useful and critical account of the law is to be found in Jack, "Suing the Crown and

(iii) Special Notice Requirements

Ontario also has certain statutory notice requirements applicable to proceedings against the Crown that have a similar effect as the special limitation periods; if the notice is not given in time, the proceedings are barred. For example, section 7(1) of the *Proceedings Against the Crown Act* provides that no action shall be commenced against the Crown unless, at least sixty days before the commencement of the action, the plaintiff has served on the Crown "a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose". In our view, this notice requirement is a trap for the unwary. An action commenced without the prior notice is invalid, and, where the applicable limitation period had expired in the meantime, the action is statute-barred and proceedings cannot be recommenced.[73] A further example is the very strict notice requirement that applies to actions against the Crown based on occupier's liability;[74] failure to give notice within ten days of such claim arising makes proceedings a nullity for which no curative order is available.

(b) Case for Reform and Recommendation

In its 1969 *Report on Limitation of Actions*,[75] the Commission recommended that the general statute of limitations should "apply to proceedings by and against the Crown in the same way as it applies with respect to ordinary persons".[76] It was further recommended that section 11 of the *Public Authorities Protection Act* should be repealed, along with nearly all other special limitation periods.[77] Under this proposal, while special notice requirements would be retained, their breach would no longer constitute an absolute bar to an action; rather, there would be a judicial discretion to relieve against an unjust result.[78]

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the application of the Charter" (1986), 7 Advocates' Q. 277, at 302-10.

Many other special limitation periods that are applicable to actions against the Crown are reviewed in Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), at 74-84.

[73] Section 7(2) of *Proceedings Against the Crown Act*, *supra*, note 64, goes a short distance to resolve this problem by providing that, if notice is given within 60 days of the expiration of the applicable limitation period, the limitation period is extended to the end of the 60-day period plus an additional 7 days.

[74] *Ibid.*, s. 7(3).

[75] *Supra*, note 72.

[76] *Ibid.*, at 137. A special limitation period of 30 years would apply to actions to recover Crown lands: *ibid.*, 139.

[77] *Ibid.*, at 78.

[78] *Ibid.*, at 84.

The Government of Ontario has not yet implemented our recommendations in the *Report on Limitations of Actions*. In 1977, the Government issued a "discussion draft" of a proposed new *Limitations Act*.[79] In 1983, the Government introduced Bill 160,[80] which was to be enacted as a new *Limitations Act*, and which proposed to carry out all the recommendations of the Commission pertaining to the Crown. However, that bill lapsed before passage. Although at the time of reporting no new bill has been introduced, the Commission understands that Bill 160 generally reflects the policy of the present government, and that a similar new bill may be introduced in the near future.

The Commission once again recommends that the proposals in our 1969 *Report on Limitation of Actions* be implemented.

Recommendations

The Commission makes the following recommendations:

1. (a) The common law rule of Crown privilege, as established in *Carey v. The Queen in Right of Ontario* is generally satisfactory and need not be altered. However, for greater certainty, we recommend that the rule should be expressly included as a part of the new *Crown Liability Act*.

   (b) The statutory provision should provide that, where Crown privilege is claimed with respect to any evidence, documentary or otherwise, the court may examine the evidence.

   (c) The court should allow disclosure of the evidence, unless it is satisfied that the injury to the public interest that would be caused by disclosure would outweigh the injury to the administration of justice that would be caused by withholding the evidence.

   (d) The proposed Act should provide that the court has the power to inspect privately the evidence for which Crown privilege is claimed.

   (e) In the appropriate circumstances, the court should be entitled to order limited disclosure, subject to such terms and conditions as it deems necessary.

2. Section 12 of the *Proceedings Against the Crown Act*, which relates to the issues of disclosure and privilege, should be repealed.

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[79] Ministry of the Attorney General, Ontario, *Discussion Paper on Proposed Limitations Act* (1977).

[80] *Limitations Act, 1983*, Bill 160(G), 1983 (32nd Legis., 3d. Sess.).

3. The Crown should be liable to give discovery to the same extent and in the same manner as if the Crown were a corporation.

4. Section 15 of the *Proceedings Against the Crown Act*, which prohibits jury trials against the Crown, should be repealed.

5. The proposals in the Commission's 1969 *Report on Limitation of Actions* should be implemented.

CHAPTER 6

ENFORCEMENT OF JUDGMENTS, COSTS, AND INTEREST

1. ENFORCEMENT OF JUDGMENTS

(a) EXECUTION

(i) Present Law

Execution is a procedure for the enforcement of judgments that involves the seizure and sale of a judgment debtor's property.[1] The proceeds of sale are used by the sheriff to pay the sum due to the judgment creditor.[2]

The Crown was immune from execution at common law.[3] The reason for the immunity seems to have been the same reluctance to make a coercive order against the Crown that led to the Crown's immunities from mandamus, injunction, and specific performance.[4] The immunity has also been justified on the basis that the seizure of Crown property could cause intolerable interruptions in public services.[5] Yet another justification is that execution against the Crown is unnecessary, because the Crown would always satisfy a judgment against it.[6]

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[1] See, generally, Dunlop, *Creditor-Debtor Law in Canada* (1981), ch. 6, and Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (hereinafter referred to as "Report on Enforcement"), Parts II and III.

[2] The text describes the most common form of execution, which applies to judgments for the payment of money, and which is levied by a writ of seizure and sale. Other writs of execution, adapted for particular purposes, include writs of possession (seizure of land), delivery (seizure of goods), sequestration (seizure of rents and profits). See, generally, Rules of Civil Procedure, O. Reg. 560/84, R. 60. Garnishment (or attachment of debts) and contempt orders are discussed *infra*, this ch., sec. 1(b) and (c), respectively.

[3] Chitty, *A Treatise on the Law of Prerogatives of the Crown* (1820), at 376, and *The King v. Central Railway Signal Co. Inc.*, [1933] S.C.R. 555, [1933] D.L.R. 737.

[4] See discussion, *supra*, ch. 4, secs. 3 and 5.

[5] Law Reform Commission of Canada, *The Legal Status of the Federal Administration* (1985), at 76.

[6] *Franklin v. The Queen (No. 2)*, [1974] 1 Q.B. 205, at 218, [1973] 4 W.L.R. 636.

In Ontario, the Crown's immunity from execution is now statutory. Section 25 of the *Proceedings Against the Crown Act*[7] expressly provides that no execution or similar process shall be issued out of any court against the Crown.[8]

Although execution is not available in Ontario to enforce a judgment against the Crown, section 26 of the *Proceedings Against the Crown Act* makes provision for the payment of a judgment. Section 26 provides as follows:[9]

> The Treasurer of Ontario shall pay out of the Consolidated Revenue Fund the amount payable by the Crown under an order of a court that is final and not subject to appeal or under a settlement of a proceeding in a court.

The mandatory word "shall" in this section imposes a duty on the Treasurer to pay all judgment debts. The Act does not qualify the duty to pay a judgment debt with any requirement that there be an available appropriation of the necessary funds.[10] In effect, the statute is itself a permanent appropriation of funds for the satisfaction of judgment debts.[11]

The section 26 requirement for payment by the Crown of judgment debts stipulates that the debt be payable "under an order of the court that is final and not subject to appeal" or "under a settlement of a proceeding in court".[12]

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[7] R.S.O. 1980, c. 393, s. 25(1), as en. by S.O. 1983, c. 88, s. 1, as am. by S.O. 1985, c. 6, s. 16(1).

[8] There is a similar provision in each Canadian jurisdiction and in the United Kingdom: Canada, *Crown Liability Act*, R.S.C. 1985, c. C-50, s. 17, and *Federal Court Act*, R.S.C. 1985, c. F-7, s. 56; British Columbia, *Crown Proceeding Act*, R.S.B.C. 1979, c. 86, s. 13; Alberta, *Proceedings Against the Crown Act*, R.S.A. 1980, c. P-18, s. 25; Saskatchewan, *The Proceedings Against the Crown Act*, R.S.S. 1978, c. P-7, s. 19; Manitoba, *Proceedings Against the Crown Act*, R.S.M. 1987, c. P-140, s. 19; Quebec, Code of Civil Procedure, R.S.Q. 1977, c. C-25, s. 94.9; New Brunswick, *Proceedings Against the Crown Act*, R.S.N.B. 1973, c. P-18, s. 17; Nova Scotia, *Proceedings Against the Crown Act*, R.S.N.S. 1967, c. 239, s. 19; Prince Edward Island, *Crown Proceedings Act*, R.S.P.E.I. 1974, c. C-31, s. 19; Newfoundland, *Proceedings Against the Crown Act*, S.N. 1973, c. 59, s. 26; United Kingdom, *Crown Proceedings Act, 1947*, 10 & 11 Geo. 6, c. 44, s. 25.

[9] See *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 203(3), which repealed s. 26 of the *Proceedings Against the Crown Act*, and substituted this new provision. The other provincial statutes use the same mandatory language. See: B.C., *supra*, note 8, s. 13; Alta., *supra*, note 8, s. 24; Sask., *supra*, note 8, s. 19; Man., *supra*, note 8, s. 16; Que., *supra*, note 8, s. 94.10; N.B., *supra*, note 8, s. 17; N.S., *supra*, note 8, s. 19; P.E.I., *supra*, note 8, s. 19; Nfld., *supra*, note 8, s. 25. In the federal jurisdiction, the *Crown Liability Act*, *supra*, note 8, s. 17, uses the word "may", but the *Federal Court Act*, *supra*, note 8, s. 57(3) uses the word "shall".

[10] See discussion of the requirement of appropriation of funds, *supra*, ch. 3, sec. 1(c).

[11] *Northrop Corp. v. The Queen*, [1977] 1 F.C. 289, (1976), 68 D.L.R. (3d) 182 (F.C.T.D.).

[12] *Supra*, note 9.

The extent of Crown liability on a judgment of the court remains, of course, subject to the ultimate control of the legislature. Although the Crown is liable to pay all judgments entered against it, no matter how numerous or how large, the legislature may at any time limit or abrogate the Crown's liability by legislation. This can be done either before the fact, by denying or capping the Crown's liability for a particular kind of damage, or, though in practice more rarely, after the fact, by retroactively reversing or modifying a judgment awarded against the Crown. It appears to be generally accepted that the *Canadian Charter of Rights and Freedoms*[13] does not prohibit retroactive laws of this kind. Nor does the Charter of Rights, or any other constitutional rule, require that compensation be paid for the expropriation of private rights.[14]

(ii) Case for Reform and Recommendation

Apart from the possibility of retroactive legislative nullification, the current state of the law provides virtually complete assurance that the Crown in right of Ontario will always pay a judgment debt. As we indicated, although the Crown in right of Ontario is immune from execution, the Treasurer is under a statutory duty to pay any judgment debt or any sum agreed to in an out-of-court settlement. We regard it as highly unlikely that the Treasurer would refuse to carry out this duty; however, if the Treasurer did refuse, under the Commission's earlier recommendation that mandamus be available against the Crown,[15] mandamus would lie to compel him to make the payment. Moreover, in the even more remote event that the Treasurer refused to comply with the order of mandamus, under our further recommendation made below,[16] he would then be in contempt and liable to imprisonment or a fine. Consequently, the combination of the existing statutory duty of the Treasurer and these recommendations makes a judgment debt of the Crown incomparably more secure than that of a private debtor.

In the Commission's view, it is therefore unnecessary to make execution available to a judgment creditor. Furthermore, we believe it is inappropriate that public property should be vulnerable to seizure and sale at

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[13] Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.) as am. by the Constitution Amendment Proclamation, 1983, SI/84-102. Section 11(g) of the Charter prohibits retroactive penal laws, but not other kinds of retroactive laws. See Hogg, *Constitutional Law of Canada* (2d ed., 1985), at 775-76.

[14] Section 7 of the Charter protects "life, liberty and security of the person", but not property. There is no clause in the Charter or elsewhere in the Constitution of Canada requiring compensation for the taking of property. See, generally, Hogg, *supra*, note 13, at 574-79.

[15] *Supra*, ch. 4, sec. 5(b)(iii).

[16] *Infra*, this ch., sec. 1(c).

the instance of a private party.[17] The potential disruptions of public services that could ensue militates strongly against such a measure.[18] Accordingly, the Commission recommends that the Crown's immunity from execution be continued.[19]

(b) GARNISHMENT

(i) Crown as Judgment Debtor

a. Present Law

Garnishment, or the attachment of debts, is a procedure for the enforcement of judgments that involves the seizure of debts owing by a third party to the judgment debtor.[20] A judgment creditor obtains a garnishment order against the third party, or "garnishee", who owes money to the judgment debtor; the order "attaches" the debt, requiring that it be paid to the sheriff, who uses the funds to pay the judgment creditor.

At common law, the Crown's immunity from execution extended to the attachment of debts owing to the Crown; garnishment was not available as a means of enforcing a judgment against the Crown. Section 25 of the *Proceedings Against the Crown Act*[21] continues this prohibition of attachment of debts, owed by a third party to the Crown.[22]

b. Recommendation

In the Commission's opinion, there is no reason to abrogate the Crown's immunity from garnishment as a means of enforcing judgments against the Crown. As with execution, the statutory duty of the Ontario

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[17] As indicated, *supra*, note 8, execution against the Crown is prohibited in all jurisdictions in Canada, as well as in the United Kingdom.

[18] The Law Reform Commission of Canada has recommended that "all state property should be subject to compulsory execution". However, that Commission recommended that "some exceptions might be expressly enumerated by statute", and would also give to the court the power to exempt property where the Crown shows "that the property in question is essential to the organization and operation of the public service": The Law Reform Commission of Canada, *Immunity from Execution* (1987), at 74-75, and 84-85.

[19] *Crown Liability Act*, *infra*, Appendix 1 (hereinafter referred to as "draft Act"), s. 3(a).

[20] See, generally, Dunlop, *supra*, note 1, ch. 8 and the Report on Enforcement, *supra*, note 1, Part II, ch. 3.

[21] *Supra*, note 7.

[22] Garnishment is also prohibited in all other Canadian jurisdictions, and the United Kingdom. The statutory provisions are the same ones that prohibit execution against the Crown: *supra*, note 8.

Treasurer to pay any judgment entered against the Crown makes additional means of enforcement unnecessary. Accordingly, the Commission recommends that the Crown's immunity from garnishment as a means of enforcing judgment debts owed by the Crown should be continued.[23]

(ii) Crown as Garnishee

a. Present Law

At common law, the Crown is also immune from a garnishment order that directs it to pay to the sheriff a debt owing by the Crown to a third party.[24] The supposed difficulty of making an order against the Crown, which is the source of so much Crown immunity, seems once again to have been the rationale for this rule.[25] An important consequence of the Crown's immunity at common law from a garnishment order was that a judgment creditor could not attach the wages of a Crown servant.

In 1983, in response to a recommendation of this Commission,[26] section 25 of the *Proceedings Against the Crown Act* was amended to make garnishment available against the Crown for money owing "as remuneration payable by the Crown for goods and services".[27] This amendment allowed the garnishment of debts owed by the Crown to suppliers of goods and services, including the wages owed to Crown servants. However, the amendment did not go so far as to allow the garnishment of all debts owed by the Crown, as the Commission had recommended. In 1985, a further amendment of section 25 allowed a person who was entitled to support or maintenance under a court order to garnish all debts owed by the Crown.[28] As a result of these cumulative amendments in Ontario, there is an extensive, although incomplete, right to garnish debts owed by the Crown.[29]

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[23] Draft Act, s. 3(b).

[24] *Canadian National Railway v. Croteau*, [1925] S.C.R. 384, [1925] 3 D.L.R. 1136, and *Royal Bank of Canada v. Scott*, [1971] 4 W.W.R. 491, 20 D.L.R. (3d) 728 (N.W.T. Ct.).

[25] *Canadian National Railway v. Croteau*, *supra*, note 22. See, also, *Martin v. Martin* (1981), 33 O.R. (2d) 164 (H.C.J.).

[26] Report on Enforcement, *supra*, note 1, Part II, at 149.

[27] *Proceedings Against the Crown Amendment Act, 1983*, S.O. 1983, c. 88, s. 1.

[28] *Support and Custody Orders Enforcement Act, 1985*, S.O. 1985, c. 6, s. 16, as am. by the *Proceedings Against the Crown Amendment Act, 1988*, S.O. 1988, c. 29, s. 1.

[29] For an account of the law, see Report on Enforcement *supra*, note 1, Part II, at 146-50, recommending that all debts owed by the Crown should be available to a judgment creditor by way of garnishment.

b. Recommendation

There appears to be no good reason why a garnishment order should not be available against the Crown, whatever the nature of the debt owing. The purpose of the order is to enforce a judgment debt owed by a private debtor, not by the Crown itself. No public interest seems to be impaired when a debt owed by the Crown to a third party is attached, because the only result is that the Crown is required to pay the debt to the sheriff instead of to the Crown's original creditor, who is now a judgment debtor in default.

Accordingly, the Commission recommends that the residual immunities from garnishment of debts owed by the Crown to a third party judgment debtor should be eliminated, and that all such debts owed by the Crown should be subject to garnishment.[30]

(c) CONTEMPT

(i) Present Law

Disobedience of a court order, other than a judgment for the payment of money, is contempt of court, and is punishable by imprisonment or fine.

Contempt has never been available against the Crown itself. Indeed, in origin, disobedience of a court order was punishable on the ground that it was contemptuous of the *King's* authority.[31] It was therefore impossible for the King himself to be in contempt. It was also considered unthinkable that the courts could imprison or fine the King.[32] In fact, the courts never permitted the question to be raised; as we have seen, the courts consistently refused to issue the coercive orders of mandamus, injunction, or specific performance, or to allow discovery, or to permit execution or attachment, against the Crown.

Nevertheless, where an order was made against an officer or servant of the Crown because the defendant personally owed the duty, the order could be enforced by civil contempt. In the words of Dicey, "every official from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen".[33]

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[30] Draft Act, s. 2(2)(g). The procedure for garnishment is set out in s. 9 of the draft Act.

[31] Watkins, "The Enforcement of Conformity to Law through Contempt Proceedings" (1967), 5 Osgoode Hall L.J. 125, at 126.

[32] Law Reform Commission of Canada, *Immunity from Execution* (1987), at 39-42. See, also, Hogg, *Liability of the Crown* (2d ed., 1989), at 54-55.

[33] Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., 1965), at 193.

(ii) Case for Reform and Recommendation

If, as the Commission has recommended, orders mandamus, injunction and specific performance are to be available against the Crown, the Crown's immunity from contempt must be re-examined. Indeed, the issue whether the Crown should be open to a citation for contempt is already a live one, because discovery and garnishment are currently available against the Crown. The question could therefore arise even now as to what should be done if the Crown disobeys a court order.

It may be argued that any attempt to enforce compliance with a court order by the Crown could lead to a damaging confrontation between the judicial and executive branches of government which, in the end, the judicial branch is bound to lose. From this perspective, where the Crown is intransigent in its refusal to obey a court order, there is nothing that a court should do to enforce compliance; the making of the order is as far as the court ought ever to go. Since the Crown would rarely choose to disobey, the aggrieved citizen would nearly always obtain her remedy. In the highly unusual situation where the Crown refused to obey, it could safely be assumed that this decision had been reached by the executive upon the basis of some grave public policy objection that the court should not attempt to override.

While we recognize that this argument has some force, on balance we are of the view that the civil contempt order should be available to enforce orders against the Crown. If orders against the Crown were not enforceable by contempt, the Commission has no doubt that they would nearly always be obeyed. The respect for the rule of law by Canadian governments and the people who elect them makes compliance the morally correct and politically wise course of action; at the cabinet level, an Attorney General would virtually always counsel compliance. Nevertheless, it is not unreasonable to anticipate occasional cases of non-compliance. Indeed, while this might only be in the form of delay by low level officials, our discussion of interlocutory declarations has indicated that disregard for court orders occasionally arises at the ministerial level.[34] In our view, the contempt power is needed to provide the court with the ability to ensure compliance with its orders.

We are confident that genuine difficulties in compliance would not be disregarded by a court that is invited to hold officials in contempt; nor would serious public policy objections to compliance be disregarded. It must be remembered that public policy considerations will often be taken into account by the court prior to any order being made against the Crown in the first place. For example, before the Crown is ordered to produce documents, the court must consider the Crown privilege claim that public policy requires that the documents be withheld. Moreover, discretionary remedies

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[34] See discussion *supra*, ch. 4, sec. 4(a)(iii).

such as injunction and specific performance will almost certainly involve consideration by the court of relevant concerns for public interests and public policy. Furthermore, where an order has been made against the Crown, and the Crown still refuses to comply, contempt proceedings provide a full hearing, and yet a further opportunity to persuade a court that there are good and sufficient reasons for such refusal. An order for contempt is itself discretionary and involves no mandatory penalty.[35]

As a final safeguard, in the highly unlikely event that a court makes a contempt order against the Crown or a Crown servant without good and sufficient reason, that order is subject not only to appeal but also to retroactive legislative nullification. To be sure, such legislative action will expose the executive's grounds for disobedience of the court order to debate within the Legislative Assembly and in the community at large; however, we think it entirely appropriate that a refusal to obey a court order should, in fact, be exposed to the most careful public scrutiny.

It seems to us that there is no practical impediment to making the Crown liable for civil contempt for breach of a court order.[36] The Crown could be subject to the same liability as a corporation; like a corporation, although the Crown could not be imprisoned, it could be ordered to pay a fine.[37] The court could also be empowered, upon finding the Crown in contempt, to make an order against an officer or servant of the Crown,[38] either directing that person to carry out the duty, or fining or even imprisoning the person responsible for the Crown being in default.

Exposing officers or servants of the Crown to liability for contempt is not as radical a position as it might first appear. It will be recalled that such officers or servants have always been subject to mandamus or injunction when acting as *persona designata* or committing a tort in the course of

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[35] See Rules of Civil Procedure, *supra*, note 2, r. 60.11(5), authorizing the court on an application for a contempt order to make "such order as is just", and providing for a variety of penalties. For an account of the common law, see Watkins, *supra*, note 31, above.

[36] The Commission does not accept the recommendation of a study paper prepared for the Law Reform Commission of Canada, *supra*, note 18, at 51-57, and 71-72, that instead of the sanction of contempt, a new sanction of "astreinte" (copied from France) should be available against the Crown to enforce court orders. An order of astreinte would impose a monetary penalty on the Crown for each day of default. Such a sanction is foreign to Canadian law and would be applicable only to the Crown. The civil contempt order is familiar to Canadian law, and is applicable to all persons subject to a court order, including officers and servants of the Crown when they act as *persona designata* or commit a tort or breach of contract in the course of their duties.

[37] For an argument that in appropriate cases the Crown should be liable to pay a fine, see Hogg, *supra*, note 32, at 175-80.

[38] See Rules of Civil Procedure, *supra*, note 2, r. 60.11(6), authorizing the making of an order against an officer or director of a corporation found in contempt.

their duties;[39] breach of any such court order is punishable by contempt under the present law. It would, however, be novel to extend the liability of officers and servants to contempt proceedings to include cases where it is the Crown that is in breach of some legal duty. Nevertheless, in the Commission's view, the most efficient way of securing compliance with an order that is being blocked by bureaucratic resistance would be to provide that a contempt order may be made against the person who has ultimate responsibility for the work of the ministry or agency that is refusing to comply with the order. It is generally the function of a minister or agency head to acquire the relevant information and secure compliance with a court order, and it should not be a sufficient answer that the minister or head disclaims knowledge of the breach of the court order.

Accordingly, we recommend that the Crown should be liable for civil contempt for breach of a court order to the same extent as if the Crown were a corporation. The court should also have the power, on finding the Crown to be in contempt, to make an order against an officer or servant of the Crown. The court should ordinarily direct its contempt order to a minister, who should bear responsibility for all the work of the ministry under her control. However, in appropriate circumstances, the court should be able to penetrate the bureaucracy and fasten its orders on an individual below the ministerial level, as well as on the responsible minister.

2. COSTS

(a) PRESENT LAW

At common law, the Crown neither received nor paid costs.[40] The rationale for this rule was explained by Blackstone in the following terms: "[A]s it is his [the King's] prerogative not to pay them to a subject, so it is beneath his dignity to receive them".[41]

In most Commonwealth jurisdictions, there is now express statutory provision making the Crown liable to pay costs, and entitling the Crown to receive costs, according to the same rules as apply in proceedings between subjects.[42] In those jurisdictions where there is no express provision with

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[39] See discussion, *supra*, ch. 4, sec. 5(b).

[40] *Johnson v. The Queen*, [1904] A.C. 817, 53 W.R. 207 (P.C., Sierra Leone) and *Attorney-General of Queensland v. Holland* (1912), 15 C.L.R. 46, A.L.R. 480 (H.C.).

[41] Blackstone, *Commentaries on the Laws of England* (1768), Book 3, ch. 24, at 400.

[42] Canada, *Crown Liability Act*, *supra*, note 8, s. 28; B.C., *supra*, note 8, s. 11(1)(a); Alta., *supra*, note 8, s. 16; Sask., *supra*, note 8, s. 17(1); Man., *supra*, note 8, s. 17(1); N.B., *supra*, note 8, s. 14(1); N.S., *supra*, note 8, s. 15(1); P.E.I., *supra*, note 8, s. 15(1); Nfld., *supra*, note 8, s. 15; and United Kingdom *Administration of Justice (Miscellaneous Provisions) Act 1933*, 23 & 24 Geo. 5, c. 36.

respect to the liability of the Crown for costs, the same position usually obtains by reason of general language that expressly or impliedly places the Crown in the same position as any subject with respect to the applicable civil procedure.[43]

The Ontario Crown does not have an express statutory duty to pay, or right to receive, costs. Formerly, section 26 of the *Proceedings Against the Crown Act* authorized a court to order a payment of costs by the Crown. However, section 26 was repealed by the *Courts of Justice Act, 1984*,[44] and replaced by a new section 26 that makes no express provision for costs for or against the Crown.

Nevertheless, the argument that costs are available for and against the Crown in right of Ontario is strong. Sections 8, 9, and 10 of the *Proceedings Against the Crown Act* all contemplate that proceedings against the Crown are to be instituted and proceeded with in accordance with the applicable statutes and rules of court. These provisions suffice to make the ordinary rules regarding costs applicable to the Crown as defendant. Furthermore, section 141(2) of the *Courts of Justice Act, 1984* carries the necessary implication that costs can be awarded to the Crown. Section 141(2) provides as follows:

> 141.–(2) In a proceeding to which her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a barrister or solicitor who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

However, the general subjection of the Crown to the rules of court applies only to "proceedings *against* the Crown".[45] It is certainly arguable that these provisions apply only where the Crown is a defendant, and that costs are not awardable where it is the Crown that initiates proceedings.

(b) Recommendation

While it seems probable that the Crown no longer enjoys any immunities in regard to the payment of costs, the law of Ontario regarding costs and the Crown is not as clear as we would like to see it. As we have indicated, there is no direct statutory provision obliging the Crown to pay costs, and there is some uncertainty about whether costs may be awarded where the Crown initiates the proceedings. In order to remove any uncertainty, we recommend that a new *Crown Liability Act* should provide that

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[43] Ontario *Proceedings Against the Crown Act*, *supra*, note 7, ss. 8, 9, and 10; Que., *supra*, note 8, s. 94.

[44] *Supra*, note 9.

[45] *Proceedings Against the Crown Act*, *supra*, note 7, ss. 8, 9, and 10 (emphasis added).

the Crown shall receive and pay costs in accordance with the same rules as apply between private parties.

3. INTEREST

(a) PRESENT LAW

In Ontario, as in most Commonwealth jurisdictions, interest on unsatisfied judgments is payable by statute.[46] By virtue of section 24 of the *Proceedings Against the Crown Act*, the Crown is under the same obligation to pay interest on a judgment debt as a private judgment debtor.[47] Section 24 provides as follows:

> 24. A judgment debt due to or from the Crown bears interest in the same way as a judgment debt due from one person to another.

(b) RECOMMENDATION

Since the Crown is under the same obligation to pay interest as a private person, and there is no reason to place the Crown in a different position, no change in the law is recommended.

RECOMMENDATIONS

The Commission makes the following recommendations:

1. The Crown's immunity from execution should be continued.

2. The Crown's immunity from garnishment as a means of enforcing judgment debts owed by the Crown should be continued.

3. The residual immunities from garnishment of debts owed by the Crown to a third party judgment debtor should be eliminated, and all such debts owed by the Crown should be subject to garnishment.

4. The Crown should be liable for civil contempt for breach of a court order to the same extent as if the Crown were a corporation. The court should also have the power, on finding the Crown to be in contempt, to make an order against an officer or servant of the Crown. The court should normally direct its contempt order to a minister, who should

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[46] *Courts of Justice Act, 1984*, *supra*, note 9, s. 139.

[47] Analogous provisions are found in most other jurisdictions: Canada, *Crown Liability Act*, *supra*, note 8, s. 31, and *Federal Court Act*, *supra*, note 8, s. 12; B.C., *supra*, note 8, s. 12; Alta., *supra*, note 8, s. 23; Sask., *supra*, note 8, s. 18; Man., *supra*, note 8, s. 15; Que., *supra*, note 8, although s. 94 is not explicit; N.B., *supra*, note 8, s. 16; N.S., *supra*, note 8, s. 18; P.E.I., *supra*, note 8, s. 18; Nfld., *supra*, note 8, s. 24, and U.K., *supra*, note 8, s. 24.

bear responsibility for all the work of the ministry under her control. However, in appropriate circumstances, the court should be able to penetrate the bureaucracy and fasten its orders on an individual below the ministerial level, as well as on the responsible minister.

5. A new *Crown Liability Act* should provide that the Crown shall receive and pay costs in accordance with the same rules as apply between private parties.

6. Since the Crown is under the same obligation to pay interest as a private person, and there is no reason to place the Crown in a different position, no change in the law is recommended.

CHAPTER 7

STATUTES

1. PRESUMPTION OF CROWN IMMUNITY

(a) Introduction: Rule of Construction

The Crown enjoys a measure of immunity from statute law by virtue of a common law rule of statutory construction or interpretation—often expressed as a rebuttable "presumption"—which holds that the Crown is not bound by statute except by express words or necessary implication.[1] General language in a statute, such as "person" or "owner" or "landlord", will be interpreted as not including the Crown, unless the statute expressly states that it applies to the Crown, or unless the context of the statute makes it clear beyond doubt that the Crown must be bound.

The presumption against the Crown being bound by statute seems initially to have applied only to statutes whose application would strip the King of his prerogative, that is to say, rights, or powers, privileges, or immunities that were peculiar to the King. It appears that statutes that affected rights enjoyed by the Crown in the same way as his subjects had been originally construed without applying any presumption as to Parliament's intention.[2]

In *Willion v. Berkley*,[3] the Court of King's Bench held that the statute *De Donis Conditionalibus*, restricting the alienation of entailed land, bound the Crown, despite the absence of express words or necessary implication. Brown J. observed that "it is a difficult argument to prove that a statute, which restrains men generally from doing wrong, leaves the King at liberty to do wrong".[4] He added that when the King perceived a mischief and

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[1] See, generally, Street, "The Effect of Statutes on the Rights and Liabilities of the Crown" (1948), 7 U. Toronto L.J. 537; Williams, *Crown Proceedings* (1948), at 48-58; Street, *Governmental Liability* (1953), at 143-56; McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (1977); Côté, *The Interpretation of Legislation* (1984), at 154-71, and Churches, "An Historical Survey of the Presumption in the Common Law that General Statutes do not bind the Crown" (unpublished Ph.D. thesis, University of Adelaide, 1988).

[2] Hogg, *Liability of the Crown* (2d ed., 1989), at 203.

[3] (1561), 1 Plowden 223, 75 E.R. 339 (K.B.) (subsequent references are to 1 Plowden).

[4] *Ibid.*, at 248.

ordained a remedy, "it is not to be presumed that he intended to be at liberty to do the mischief".[5] In the same case, Dyer C.J. stated, "that which is necessary and useful to be reformed requires to be reformed in all, and not in part only".[6]

Despite this apparently limited original scope, the presumption that a statute does not bind the Crown eventually came to be applied to the interpretation of every statute, whether or not the prerogative was affected, and irrespective of the purpose of the statute.[7] This development culminated in the decision of the Privy Council in *Province of Bombay v. Municipal Corporation of Bombay*,[8] which settled the present form of the rule, and which has been accepted as authoritative by the Supreme Court of Canada.[9]

The *Bombay* case raised the question whether the Crown was bound by a statute granting powers to a municipality. The Crown in right of the province of Bombay held land in the city of Bombay. The Crown claimed to be exempt from certain legislation that conferred power on an official of the city to lay water-mains "into, through or under any land whatsoever within the city". The legislation was silent as to whether this power was exercisable over land held by the Crown. The Privy Council held that the legislation did not bind the Crown because it did not do so by express words or necessary implication.

The *Bombay* case settled a uniform rule, which cast immunity in the widest possible terms and applied to all statutes, regardless of their purpose or of the kinds of rights affected. However, the court in *Bombay* did not ask or answer the policy question why such an immunity is needed. And a rule without a clear and understandable rationale is an unstable thing. Courts that have affirmed their adherence to the *Bombay* rule have nevertheless struggled to find ways of escaping from it; the result has been the creation of many exceptions or distinctions that have severely undermined the rule, and introduced grave uncertainty as to its operation.

These various exceptions and distinctions will be discussed in turn later in this chapter, which will conclude with an argument for reform. First, however, we turn to examine the statutory versions of the presumption that have been enacted in Ontario and other Commonwealth jurisdictions.

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[5] *Ibid.*

[6] *Ibid.*, at 250.

[7] The history has been traced in detail by Street (1948), *supra*, note 1, at 1, and by Churches, *supra*, note 1, at 1.

[8] [1947] A.C. 58, 62 T.L.R. 643 (P.C., India).

[9] See *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, at 557, 4 D.L.R. (4th) 193. The *Bombay* test makes no differentiation between types of statutes involved, or types of rights or obligations imposed. It is possible however that some of the statutory codifications of the rule do preserve, or create, some differentiation between statutes: see *infra*, note 11.

(b) Codification of the Presumption

(i) Ontario

Section 11 of the Ontario *Interpretation Act*[10] provides:

> 11. No Act affects the rights of Her Majesty, Her heirs or successors, unless it is stated therein that Her Majesty is bound thereby.

Since section 11 does not explicitly recognize that the Crown can be bound by necessary implication, it is arguable that section 11 enlarges the Crown's common law immunity by providing that the Crown is only bound by express words.[11] However, the better view is probably that the statutory provisions are simply declaratory of the common law, so that the Crown could be bound by necessary implication as well as by express words.[12] Drafting practice in Ontario appears to be premised on the assumption that the Crown may be bound by a clear implication from the context: it is common to find statutes that do not include an express statement that the Crown is bound, and yet whose primary purpose is obviously to control the actions of government.[13]

(ii) Other Jurisdictions

The federal *Interpretation Act*,[14] and its analogue in each Canadian province, include a provision that purports to state when the Crown is to be bound by statute. The most common provision is a statutory restatement

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[10] R.S.O. 1980, c. 219.

[11] It is probable that the phrase "affects the rights of Her Majesty" encompasses any prejudicial effect on the Crown, which is the same as the common law. However, the word "rights" has been given a narrower interpretation in three cases: *Dominion Building Corp. Ltd. v. The King*, [1933] A.C. 533, at 549, 49 T.L.R. 516 (P.C., Can.); *Gartland Steamship Co. v. The Queen*, [1960] S.C.R. 315, at 345, 22 D.L.R. (2d) 385; and *The Queen in Right of Ontario v. Board of Transport Commissioners*, [1968] S.C.R. 118, at 124, 65 D.L.R. (2d) 425. In all three cases, the statute in issue was held to bind the Crown, despite the absence of express words or necessary implication.

[12] McNairn, *supra*, note 1, at 18-19, and Côté, *supra*, note 1, at 169 and 171 (with reference only to Quebec and the federal jurisdiction).

[13] The Commission's review of the Ontario statutes in 1987 revealed a total of 619 statutes, of which only 28 contained an express statement that the Crown was to be bound. Those that did not include such a statement included many that were plainly intended to bind the Crown: see, for example, the *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393 and the *Public Service Act*, R.S.O. 1980, c. 418 and the twenty-six statutes establishing ministries or departments of the government of Ontario. A casual survey of other jurisdictions reveals the same pattern of sparing use of an express statement, and its frequent omission from statutes plainly intended to bind the Crown.

[14] R.S.C. 1985, c. I-21.

of the common law presumption that the Crown is not bound. For example, section 17 of the federal *Interpretation Act* provides:[15]

> 17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to in the enactment.

The British Columbia provision, however, reverses the common law presumption of Crown immunity. Section 14 of the *Interpretation Act*,[16] provides:

> 14. Unless an enactment otherwise specifically provides, every Act, and every enactment made thereunder, is binding on Her Majesty.

Under the standard statutory provision used in most jurisdictions, a legislative draftsman must deliberately bind the Crown where that is the desired result. In British Columbia, the legislative draftsman must deliberately *exempt* the Crown if that is desired. The same presumption applies in Prince Edward Island, which, in 1981, repealed its provision requiring an express statement to bind the Crown, and replaced it with a provision identical to that of British Columbia.[17]

(c) Express Words Binding the Crown

As we have indicated, the common law rule and the statutory immunity provisions both acknowledge that the Crown is bound by express words. This is most commonly accomplished by including a section in the statute that states "This Act binds the Crown". A statute may also provide that only a specified part of the Act binds the Crown.

Contrary to what one might expect, express provisions binding the Crown are not routinely included in Ontario; in fact, express provisions are

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[15] *Ibid.* Section 14 of the Alberta *Interpretation Act*, R.S.A. 1980, c. I-7, provides:

> No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds Her Majesty.

Manitoba, Nova Scotia and Newfoundland have provisions similar to Alberta: R.S.M. 1987, c. I-80, s. 14, R.S.N.S. 1967, c. 151, s. 13, and R.S.N. 1970, c. 182, s. 13.

The Saskatchewan and New Brunswick provisions are similar to s. 11 of the Ontario Act: R.S.S. 1978, c .I-11, s. 7, and R.S.N.B. 1973, c. 113, s. 32.

[16] R.S.B.C. 1979, c. 206, s. 14. This amendment was a result of a recommendation of the Law Reform Commission of British Columbia, *Report on Legal Position of the Crown* (1972) (hereinafter referred to as the "B.C. Report"), ch. 7.

[17] Interpretation Act, S.P.E.I. 1981, c. 18, s. 14. The common law continues in the United Kingdom.

found in only a small number of statutes.[18] Nevertheless, Crown immunity from statutes is not as broad as might be expected, because many exceptions have been carved out of the presumption of immunity. We turn now to discuss these exceptions.

2. EXCEPTIONS TO THE PRESUMPTION

(a) Necessary Implication

As we have indicated, the common law rule of Crown immunity acknowledges that the Crown may be bound not only by express words, but also by necessary implication. Moreover, the statutory immunity provisions appear also to allow the Crown to be bound by necessary implication. The question then is what constitutes "necessary implication"?

(b) Purpose of Statute

In the *Bombay* case,[19] the Privy Council discussed the weight to be given to the purpose of a statute in determining whether it is a necessary implication that the Crown is bound. *Bombay* established that the purpose of the statute would indicate a necessary implication that the Crown was bound by it only if the purpose would be wholly frustrated unless the Crown were bound. The Privy Council denied that the Crown was bound merely because the statute was enacted "for the public good".[20] Nor would it be sufficient to show that the statute could not "operate with reasonable efficiency" unless the Crown were bound.[21] It goes without saying that the requirement to establish that a statutory purpose would be "wholly frustrated" if the Crown were not bound is an extremely difficult one.

More recently however, the Supreme Court of Canada has held that the Crown may be bound by a "logical implication" from the text of the statute. In *R. v. Ouellette*,[22] the question arose whether costs in a criminal proceeding could be awarded against the Crown. The federal *Criminal Code*[23] authorized the court to "make any order with respect to costs that it considers just and reasonable", but the Code contained no statement that the Crown was bound. The Supreme Court of Canada unanimously held that the Crown was bound by the cost-awarding section of the Code.

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[18] *Supra*, note 13.

[19] *Supra*, note 8.

[20] *Ibid.*, at 63.

[21] *Ibid.*

[22] [1980] 1 S.C.R. 568, 111 D.L.R. (3d) 216 (subsequent reference is to [1980] 1 S.C.R.).

[23] R.S.C. 1970, c. C-34, ss. 758 and 771(3).

Beetz J. found an intention to bind the Crown in various parts of the *Criminal Code*, especially the definition of a prosecutor as including the Attorney General. Although section 17 of the federal *Interpretation Act*[24] provided that the Crown was not bound by an enactment unless it contained an express mention of or reference to the Crown, Beetz J. held:[25]

> This section does not exclude the rule by which the various provisions of a statute are each interpreted in light of the others, and it is possible that Her Majesty be implicitly bound by legislation if that is the interpretation which the legislation must be given when it is placed in its context.

Accordingly, the court held that the Crown was bound by the statute, although there was neither an express statement in the *Criminal Code* that the Crown was bound, nor a finding that the purpose of the statute would be wholly frustrated if the Crown were not bound.[26]

The Supreme Court of Canada has, therefore, indicated that logical implication is now an important branch of necessary implication. Certainly, it is easier to find a logical implication in the language of a statute than it is to satisfy the requirement of total frustration of the statutory purpose. Nevertheless, the logical implication test remains highly uncertain. Judges reading a statute will almost certainly differ as to the force of oblique indications that the Crown may be covered.

(c) Beneficial Effect on Crown

A further qualification of the general rule of construction is a rule that a statutory provision that would confer a *benefit* on the Crown is not subject to the general presumption. Rather, the question whether the Crown is entitled to the benefit or advantage of a statutory provision is answered by the application of ordinary principles of interpretation.[27] The combination of the general presumption and this rule leads to the paradox that the Crown may be able to deny that a generally-worded provision applies to its prejudice, while asserting that the *same* provision applies to its benefit. For example, it has been held that the Crown can deny that a statutory limitation period applied to it, while asserting the limitation period as a defence

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[24] *Supra*, note 14.

[25] *Supra*, note 22, at 575.

[26] The Supreme Court of Canada reached a similar result in *Attorney General of Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732, 66 N.R. 380, where it held that the Crown in right of Quebec was bound by a statute, although it contained no statement that the Crown was bound, and there was no suggestion that the purpose of the statute would be wholly frustrated if the Crown were not bound.

[27] *The Queen v. Fraser* (1877), 11 N.S.R. 431 (S.C.), and *The King v. Canada Accident & Fire Assurance Co.*, [1948] 4 D.L.R. 660, 15 I.L.R. 179 (N.B.K.B.).

to an action brought against it.[28] While such a result may be counter-intuitive, even unfair, it flows inexorably from the fact that the presumption in favour of the Crown applies only to statutory provisions that would prejudice the Crown. Nevertheless, the scope of this rule may have been limited by a number of developments, particularly the benefit/burden exception, to which we now turn.

(d) Where a Burden is Linked to a Benefit

An important exception to the general presumption that the Crown is not bound arises where a statutory right is linked to or burdened with a statutory restriction or obligation. The question whether the Crown is burdened with a restriction where it claims a related statutory benefit has given rise to contradictory answers; the courts have sometimes said yes,[29] and sometimes said no.[30] However, two recent decisions of the Supreme Court of Canada make it clear that the benefit/burden exception is part of Canadian law.

In *Sparling v. Caisse de Dépôt et Placement du Québec*,[31] the Caisse, a Crown agent, owned 22 per cent of the common shares of a federally incorporated corporation. The Caisse refused to file an insiders report as required under the federal corporation statute, arguing that the filing obligation did not bind the Crown. The Quebec Court of Appeal[32] had held that when the Caisse became a shareholder of a federally-incorporated company, it took advantage of the provisions of the federal corporation statute: "it is therefore bound by all the provisions of the Act; it cannot pick and choose between those which please it and those which do not".[33]

In a unanimous decision, the Supreme Court of Canada agreed.[34] La Forest, J. removed any remaining doubt that the benefit/burden exception

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[28] Compare *The Attorney-General for Ontario v. Watkins* (1975), 8 O.R. (2d) 513, 58 D.L.R. (3d) 481 (C.A.), which held that the Crown may bring proceedings outside a limitation period, with *Attorney-General for Ontario v. Palmer* (1980), 28 O.R. (2d) 35, 108 D.L.R. (3d) 349 (C.A.) which held that the Crown may invoke a limitation period to bar proceedings brought against it. However, the correctness of the former decision may be questioned on the basis of cases holding Crown as plaintiff to the same body of law as a private plaintiff: see *infra*, this ch., sec. 2(i).

[29] *Toronto Transportation Commission v. The King*, [1949] S.C.R. 510; *The Queen v. Murray*, [1967] S.C.R. 262; and *Attorney-General for Canada v. Denis* (1986), 29 D.L.R. (4th) 314 (Alta. C.A.). See, also, McNairn, *supra*, note 1, at 10-14.

[30] *Re R. v. Rutherford* (1927), 60 O.L.R. 654, [1927] 4 D.L.R. 434 (A.D.); *The King v. Richardson*, [1948] S.C.R. 57; and *Re Workers' Compensation Board and Federal Business Development Bank* (1985), 21 D.L.R. (4th) 379, 63 N.S.R. (2d) 197 (N.B.C.A.).

[31] [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63 (subsequent references are to [1988] 2 S.C.R.).

[32] (1985), 22 D.L.R. (4th) 336, [1985] C. 4.164 (Que. C.A.).

[33] *Ibid.*, at 354.

[34] *Supra*, note 31.

exists in Canadian law. Moreover, he indicated that the exception can apply even where the benefit and burden arise under different statutes, provided that there is a "sufficient nexus" between the benefit and the burden. In *Sparling*, the court held that, since the benefits of share ownership are "indissolubly intertwined"[35] with the restrictions attendant upon that ownership, the Crown was bound by the insider reporting rules.

It appeared from the *Sparling* decision that the benefit/burden exception could have far-reaching consequences for Crown liability under statute, since many, if not most, statutes that confer rights or benefits also impose obligations or restrictions. The fact that the benefit and burden can arise under different statutes, subject to a requirement of sufficient "nexus", could allow for a significant expansion of Crown liability. However, in *CNCP Telecommunications v. Alberta Government Telephones*,[36] the Supreme Court of Canada cautioned that "a fairly tight (sufficient nexus) test for the benefit/burden exception follows from the strict test for finding a legislative intention to bind the Crown", and that "it would be inconsistent with the presumption of immunity to carve out a wide-ranging exception to the presumption".

(e) Implied Term of Contract

Because the Crown is generally bound by its contracts in the same way as a private individual, it may agree by contract to be bound by a statute that does not apply to the Crown of its own force. On occasion, courts have found that such an agreement to be bound was an implied, rather than an express, term of the contract.

For example, in *Bank of Montreal v. Attorney General of Quebec*,[37] a question arose whether the Crown in right of Quebec was bound by a provision in the federal *Bills of Exchange Act*,[38] which required the drawer of a cheque to give notice to the bank when the drawer discovered that the payee's endorsement had been forged. The Act did not bind the Crown by express words or necessary implication. However, the Supreme Court of Canada held that the Crown, as the customer of the bank, was bound by the notice provision as an implied term of the contract between the bank and its customer. Although the Crown had not agreed expressly to be bound by the Act, the Act regulated the relationship between banker and customer. Accordingly, the court held that the Act should be regarded as incorporated into any contract between banker and customer, including the Crown.[39]

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[35] *Ibid.*, at 1026.

[36] (1989), 98 N.R. 161, at 233.

[37] [1979] 1 S.C.R. 565, 25 N.R. 330.

[38] R.S.C. 1970, c. B-5, s. 49(3) and (4), now R.S.C. 1985, c. B-4, s. 48(3) and (4).

[39] This finding of an implied term has also been used to make the federal Crown, as lessor, subject to a Quebec statute conferring on a lessee a statutory right to purchase

Although the scope and application of this recent exception to the general presumption remains uncertain,[40] the doctrine of the implied term has the potential to expose the Crown to a considerable body of statute law. If it became established that the Crown as contractor always implicitly agrees to be bound by all statutes that would bind a private contractor in the same circumstances, this would come close to removing the commercial activities of the Crown from the presumption of immunity.

(f) The Crown as Commercial Actor

A related view is that when the State enters the marketplace, it should forgo all Crown-related privileges. This is an idea that has led most jurisdictions to limit the formerly absolute immunity of foreign states from proceedings before domestic courts. A foreign state is no longer immune from judicial proceedings arising out of commercial activity.[41] The notion is also to be found in some *dicta* denying Crown priority of payment of debts to debts incurred in commercial activity.[42]

However, the "commercial activity" exception has not taken hold in the context of the Crown's presumptive immunity from statute. The Supreme Court of Canada has been invited to hold that when the Crown acquires an airline it becomes subject to the same licensing requirements as commercial airlines. The court rejected the view that "where the Crown engages in ordinary commercial activities it is equally subject to the regime of control of those activities".[43]

The Supreme Court of Canada has recently affirmed that a "commercial activities" exception has never been accepted as part of Canadian law. In *CNCP Telecommunications v. Alberta Government Telephones*,[44] the Court

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the freehold of the land: *The Queen v. R.L. Belleau*, [1984] 1 F.C. 393, 37 R.P.R. 150 (T.D.).

[40] For example, in *Re Workers Compensation Board and Federal Business Development Bank*, *supra*, note 30, a loan of money by a federal Crown agent to a New Brunswick borrower was held not to have implicitly incorporated a provincial statute conferring priority on debts due to the New Brunswick Workers Compensation Board.

[41] See, for example, *Trendtex Trading Corp. v. Bank of Nigeria*, [1977] 1 Q.B. 529, [1977] 2 W.L.R. 356 (C.A.), and *Zodiak International Products Inc. v. Polish People's Republic* (1977), 81 D.L.R. (3d) 656, 4 B.L.R. 179 (Que. C.A.). This limitation has been translated into statute in some jurisdictions. See, for example, *State Immunity Act 1978*, 1978, c. 33, (U.K.), s. 3; *State Immunity Act*, R.S.C. 1985, c. S-18, s. 5.

[42] See, for example, *Food Controller v. Cork*, [1923] A.C. 647, at 660, and 666-68, [1923] All E.R. Rep. 463 (H.L.); but note the rejection of this view, in *Re K.L. Tractors, Ltd.* (1961), 106 C.L.R. 318, at 336, (1961), A.L.R. 410 (H.C.).

[43] *The Queen in the Right of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, at 69, 75 D.L.R. (3d) 257.

[44] *Supra*, note 36, at 243.

observed that "the public policy dimension of governmental commercial activities within Canada's borders is entitled to presumptive respect".

In the foregoing cases, the Crown's immunity from statute prevailed, freeing the Crown's activities from the legal rules, enacted in the public interest, that applied to the Crown's competitors. However, despite its intuitive appeal, we would observe here that an exception for commercial activity would not be an altogether satisfactory means of reform. Such an exception would be exceedingly difficult to apply, because of the absence of any principle that would enable an activity to be characterized as "commercial" rather than "governmental". Government rarely engages in any venture with the same commercial, or profit-making, objective as a private firm. An airline, railroad, hotel, mine or liquor store may look like a purely commercial venture. It may even show a profit. But the Crown is nearly always drawn into such activities by regulatory and public policy objectives that are foreign to the private sector. There appears to be no principled basis for denying to such activities the same governmental character that one would unhesitatingly apply to the more traditional functions of government.

(g) Incorporation by Reference

Where a statute binds the Crown, and where that statute incorporates by reference another statute, the incorporated statute also binds the Crown. It is not necessary that the incorporated statute include express words or a necessary implication that the Crown is bound. The incorporated statute becomes part of the incorporating statute, and if the latter statute binds the Crown, the former does too.[45]

Incorporation by reference may be implied, as well as express. For example, the courts have held that a provision in many Crown proceedings statutes, stipulating that in proceedings against the Crown the rights of the parties shall be as nearly as possible the same as in a suit between subject and subject, adopts and applies to the Crown those statutes that would be applicable to a private litigant.[46] Furthermore, the courts have held that in the Canadian federal jurisdiction, a statute that imposes tortious liability on the federal Crown is an implicit adoption of the law of the province in which the tort was committed.[47] In these ways, statutes that do not of their own force apply to the Crown, either because they do not contain the requisite express words or necessary implication, or because as provincial statutes they are constitutionally incapable of binding the federal Crown, are made applicable to the Crown.

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[45] So held in *Re Wood's Estate* (1886), 31 Ch.D. 607 (C.A.), and *Brophy v. Nova Scotia* (1985), 68 N.S.R. (2d) 158, 34 M.V.R. 312 (S.C.T.D.).

[46] See, *infra*, this ch., sec. 2(i).

[47] *The King v. Murphy*, [1948] S.C.R. 357.

(b) The Crown as Defendant

Section 17 of the Ontario *Proceedings Against the Crown Act*[48] provides:

> 17. [I]n proceedings against the Crown, the rights of the parties are as nearly as possible the same as in a suit between person and person . . .

The most obvious effect of this provision is to make the procedure in proceedings against the Crown the same as in a suit between private persons.[49] In the absence of any specific provision to the contrary, section 17 would make the full range of remedies available "in proceedings against the Crown". Section 17 is, however, expressly subject to other provisions of the Act, including those provisions that preserve the Crown's immunity from injunction and specific performance.

The section 17 "rights of the parties" provision includes both procedural and substantive rights. In *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*[50] the Supreme Court of Canada considered whether the Crown in right of Saskatchewan was liable to pay interest on a judgment that had been rendered against it in earlier proceedings. The relevant statute requiring the payment of interest did not bind the Crown by express words or necessary implication. The court held that the statute was binding on the Crown by virtue of the equivalent in the Saskatchewan Crown proceedings statute of section 17 of the Ontario Act. The court rejected the Crown's argument that the "rights of the parties" provision was confined to procedural rights; rather it held that substantive rights, including the right to interest, were also included.

The effect of the *Canadian Industrial Gas & Oil Ltd.* case is to treat section 17 as an incorporation by reference of all statutes that would affect the rights of the parties in a suit between private litigants, regardless of whether such statutes contain express words or a necessary implication that the Crown is bound. In proceedings against the Crown, all relevant statutes bind the Crown by virtue of their adoption by the Crown proceedings statute.[51]

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[48] R.S.O. 1980, c. 393.

[49] *Jamieson v. Downie*, [1923] A.C. 691, 130 L.T. 48 (P.C., N.S.W.).

[50] [1979] 1 S.C.R. 37, 91 D.L.R. (3d) 555.

[51] As Aranson and Whitmore, *Public Torts and Contracts* (1982), at 16, have commented, referring to similar Australian decisions, "a great inroad has been made upon the shield of the Crown".

(i) The Crown as Plaintiff

Section 17 of the *Proceeding Against the Crown Act* applies only to proceedings *against* the Crown.[52] A question arises as to what extent the Crown is bound by the law of the province in which the cause of action arose, where the Crown is the plaintiff.

The dominant line of authority has denied to the Crown as plaintiff the benefit of the presumption of immunity from statute, and subjects the Crown as plaintiff to the same body of law, statutory as well as common law, as a private plaintiff.[53] The rationale for this position is not entirely clear. It is not based on the notion of incorporation by reference, since the section 17 "rights of the parties" provision applies only to proceedings against the Crown. The rationale appears to be that the Crown as plaintiff takes its cause of action as it finds it, which may be seen as an extension of the burden-linked-with-benefit theory: by invoking the right to sue, the Crown becomes bound by the same restrictions on that right as would apply to any other plaintiff. Nevertheless, some cases have held to the contrary, particularly in finding that the Crown as plaintiff is exempt from statutes of limitations.[54]

3. CASE FOR REFORM AND RECOMMENDATIONS

(a) Criticism of the Presumption

We now turn to consider the justification for the presumption that the Crown is not bound by general words in a statute. As we have indicated, in its original form, the rule appears to have been that the Crown's prerogative is presumed not to be impaired by general words. This narrow rule could be justified as an aspect of the general rule that general words are usually construed as not affecting special rights. However, the present rule is not limited in this way, and has been forcefully criticized on the ground that extension of its scope proceeded without either a proper understanding of the old cases or a discussion of the reasons behind them.[55]

In particular, no answer has ever been given to the point made in 1561: when the King in Parliament ordains a remedy for a mischief, "it is not to

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[52] This is true of provisions in all provinces except section 11 of the British Columbia *Crown Proceeding Act*, R.S.B.C. 1979, c. 86, which applies whenever the Crown is a party to proceedings.

[53] *Gartland Steamship Co. v. The Queen*, [1960] S.C.R. 315, 22 D.L.R. (2d) 385, *The Queen v. Murray*, *supra*, note 29, at 62, and *B.C. Telephone Co. v. Marpole Towing*, [1971] S.C.R. 321.

[54] *Re R. v. Rutherford*, *supra*, note 30; *The King v. Richardson*, *supra*, note 30; and *Attorney-General for Ontario v. Watkins*, *supra*, note 28.

[55] Street, *supra*, note 1. The same conclusion is reached by Churches, *supra*, note 1.

be presumed that he intended to be at liberty to do the mischief".[56] In that case, this seemingly reasonable observation was made in answer to the submission of the unsuccessful counsel that "*prima facie* a law made by the Crown with the assent of Lords and Commons is made for subjects and not for the Crown".[57] However, it is the latter statement that appears to have been uncritically adopted and cited by the courts.

As we have indicated, the leading case authority for the presumption that the Crown is not bound by statute is the *Bombay* case.[58] However, that case contained no discussion of the policy rationale for the presumption; the Privy Council simply relied on prior authority for its decision that the presumption should apply to all kinds of statute without exception.

The court in *Bombay* did point out that "if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words".[59] Presumably, the court's justification of the rule would be as follows: since it is open to the Legislature when enacting a statute, either to bind the Crown or to exempt the Crown, it is a mere matter of drafting technique to accomplish the desired result. Under the present presumption, the drafter must deliberately bind the Crown where that is the desired result; if there were no presumption, then he would need deliberately to exempt the Crown where that was the desired result intended. Provided the drafter knows the law, it is of little practical consequence whether or not there is a presumption against the Crown being bound; therefore the courts should confine themselves to ensuring that the law is as clear as possible.

Although, by holding that the presumption applied to all kinds of statute, the *Bombay* case went some distance towards clarifying the uncertain state of the law at that time, the current state of the law remains exceedingly complex and unpredictable. As we have outlined above, the courts have resisted the presumption that the Crown is not bound by statutes by engrafting many exceptions onto the basic rule of immunity, and otherwise restricting its application. And, as we have seen, most of the exceptions are highly uncertain in their scope and application.

In our view, it is not a sufficient response to say that the presumption of Crown immunity is simply a matter of drafting technique. We have no doubt that, if every statute routinely included a provision stating whether or not the Crown was bound, many of the problems discussed in this chapter would disappear. However, for reasons that are obscure, such provisions

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[56] *Willion v. Berkley*, *supra*, note 3, at 248.

[57] *Ibid.*, at 240.

[58] *Supra*, note 8.

[59] *Ibid.*, at 63.

are relatively unusual. As we have indicated, in Ontario, the great majority of statutes are silent on the point.[60] There is good reason to suppose that in many cases silence does not indicate a deliberate decision to exempt the Crown, but only indicates that the point was never considered.[61] However, the current effect of silence is to make applicable the presumption of Crown immunity, even where such immunity is inappropriate or even unfair.

There are powerful arguments that the Crown should be presumed bound unless the contrary is expressed. In the last century there has been a great increase in both the scope of governmental activity and in the scope of legislative regulation. In general, where the Crown engages in an activity that is controlled by statute, it should surely be subject to the statutory controls. Moreover, where legislation is passed to benefit a class of the community, the benefits should not be denied to some members of that class merely because of their relationship with the Crown. There is no good reason, for example, why the Crown should be exempt from planning laws designed to order our environment, or building codes designed to promote health and safety, or speed limits designed to reduce accidents. As Dickson J. (as he then was) commented in *R. v. Eldorado Nuclear Ltd.*:[62]

> Why that presumption [of Crown immunity] should be made is not clear. It seems to conflict with basic notions of equality before the law. The more active government becomes in activities that had once been the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject.

Dickson J.'s concern is well illustrated by the facts in *Eldorado Nuclear Ltd.* where the Supreme Court of Canada applied the presumption of Crown immunity to hold that two Crown corporations engaged in the production of uranium were not bound by the *Combines Investigation Act*. Those corporations, therefore, could not be prosecuted for entering into a cartel, which, it was alleged, had illegally conspired to fix the price of uranium. The private participants in the cartel, on the other hand, remained exposed to criminal liability. Since it would have been unfair to prosecute only them, especially since a Minister of the Crown had been a prime mover in the formation of the cartel, the government dropped the charges against all the cartel members. The result was that an important public policy went unvindicated.

We agree with the view that, as a matter of general principle, Crown corporations engaged in the production of uranium or any other activity should be required to play by the same rules as their private counterparts. Otherwise, the public policies pursued by those rules are defeated.

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[60] *Supra*, this ch., sec. 1(c).

[61] *Ibid.*

[62] *Supra*, note 9, at 558.

The Commission readily acknowledges that the Crown requires certain unique powers, and some immunities, in order to govern effectively. However, in a system of responsible government, the executive branch of government is rarely denied the legislation it wants. Where special powers or immunities are needed, Parliament or the Legislature can and often does provide them expressly. However, a long and powerful tradition insists that when powers and immunities are specifically granted by statute, their scope should be carefully limited and defined.

In the Commission's view, the immunity that is granted by the traditional presumption against the Crown being bound by statute is far broader than is needed by an executive that controls the legislative branch; as such, this presumption conflicts with the basic constitutional assumption that the Crown should be under the law, and therefore should be reformed. That reform could take one of two forms: either the present presumption could be abolished, or the presumption could be reversed. We turn now to consider these alternative approaches.

(b) Abolition of the Presumption

The first option, the simple abolition of the presumption of Crown immunity, would mean that general words in a statute would be interpreted without the aid of any presumption. If the words were apt to apply to the Crown, they would apply in this way. If they were not, they would not so apply.

However, abolition, without more, would result in great uncertainty as to which words and phrases would be held apt to apply to the Crown. The long history of Crown immunity, the existence of prerogative rights or powers, and the sense that the Crown is different from other legal persons,[63] are among the considerations that might lead courts to find that the relevant language did not bind the Crown. At the very least, courts would need and want guidance with respect to what would be a completely new interpretative issue. In our view, the simple abolition of the presumption does not provide enough guidance, and would not be a prudent measure of reform.

A possible solution to this need for guidance might be the approach taken by the Law Reform Commission of New South Wales, in its *Report on Proceedings By and Against the Crown*, which recommended the abolition of the presumption of Crown immunity and its replacement by the following provision.[64]

(1) In this section–

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[63] Indeed, the Crown may not even be a legal person at all: see Hogg, *supra*, note 2, at 173-74.

[64] Law Reform Commission of New South Wales, *Report on Proceedings By and Against the Crown*, (1975), at 76.

"foreseeable" in relation to a legislative provision means foreseeable at the time of the making of the legislative provision;

"legislative provision" means a provision of an Act or of a regulation;

"making", in relation to a legislative provision, means, in the case of a provision of an Act, the passing of the Act and, in the case of a provision of a regulation, the making of the regulation.

"old rule" means the special rule of construction that a legislative provision binds the Crown only where it does so by express words or necessary implication.

"regulation" means ordinance, by-law, rule or other legislation made under an Act.

(2) The old rule is abolished.

(3) Where, but for the old rule, a legislative provision would bind the Crown, it shall be construed as binding the Crown except in so far as it is unlikely that it would have been intended that it bind the Crown having regard to:

(a) the foreseeable extent if any to which the legislative provision, if binding the Crown, might impede the Crown (or any agency of the Crown which would not be bound unless the Crown were bound) in any activity and the foreseeable extent to which that impediment might be against the public interest;

(b) the foreseeable extent if any to which the legislative provision, if binding the Crown, might burden the Crown (or any agency of the Crown which would not be bound unless the Crown were bound) in respect of any property and the foreseeable severity of that burden as compared with the burden upon other persons, bound by the provision, in respect of any property; and

(c) the foreseeable extent if any to which the purpose of any of the purposes of the legislative provision might fail if the Crown were not bound and the foreseeable extent to which that failure might be against the public interest.

(4) All courts and persons acting judicially shall take judicial notice of all matters pertinent to the considerations mentioned in paragraphs (a), (b) and (c) of subsection (3) and for that purpose may obtain information by any means whereby a court may obtain information for the purpose of equipping itself to take judicial notice which by law it is required to take but shall not be bound to receive evidence in respect of any of those matters.

(5) This section does not apply to a legislative provision made before the commencement of the Interpretation (Amendment) Act, 1976.

However, besides its obvious complexities, this provision raises many concerns. The presumption of Crown immunity (the "old rule") is abolished by subsection (2). Subsection (3) then establishes a threshold question, that is, "where, but for the old rule, a legislative provision would bind the

Crown". However, no guidance is provided in determining this extremely difficult question. Even after this question has been resolved in favour of binding the Crown, the Crown may nevertheless be immune if it meets the exceptions set out in subparagraphs (a), (b) and (c). They require the courts to consider whether immunity should be granted to the Crown on the basis of whether certain vaguely expressed outcomes are "foreseeable", and whether they are opposed to "the public interest" or of disproportionate "severity".

In our view, this provision replaces the unsatisfactory present rule with a new set of interpretative difficulties,[65] and should not be a model for reform.

(c) Reversal of the Presumption

The alternative approach to reform of the current law would be to reverse the present presumption. The new presumption would be that the Crown is bound by statutes, unless specific provision is made to the contrary.

This option has enjoyed significant support. It has been recommended by Glanville Williams,[66] as well as by the Law Reform Commission of British Columbia.[67] As we have discussed, it has been implemented by both British Columbia and Prince Edward Island.[68]

In our view, reversal of the presumption represents the optimal approach to reform, providing the courts with clear guidance in interpreting general words in a statute. Statutory language would include the Crown, unless the contrary is specifically provided. Accordingly, we recommend that the Crown should be bound unless an enactment otherwise specifically provides.[69] The phrase "specifically provides" is intended to be broader than the requirement of an "express" statement, and would therefore also include a necessary or clear implication, from the context, that the Crown is immune.

(d) To What Legislation Should the New Presumption Apply?

A final question with respect to the appropriate presumption is whether the proposed reversal of the presumption should apply to all existing legislation, or only to future legislation. British Columbia and Prince

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[65] New South Wales, while implementing other recommendations in the Commission's report, has not implemented this one.

[66] Williams, *Crown Proceedings* (1948), at 53.

[67] Law Reform Commission of British Columbia, *supra*, note 16, at 67.

[68] See *supra*, sec. 1(b)(ii).

[69] *Crown Liability Act*, *infra*, Appendix 1 (hereinafter referred to as the "draft Act"), s. 13.

Edward Island differed in their approaches to this question. British Columbia's reform was enacted with immediate effect on all existing statutes, as well as all future statutes. Prince Edward Island's reform was enacted with effect only on statutes enacted after the reform.[70]

The difficulty with the Prince Edward Island approach is that the presumption differs depending on the year of enactment of the statute. The former law applies to pre-1981 statutes and will linger, with all its complications and injustice, while any pre-1981 legislation remains in force. This state of affairs is complicated even further by post-1981 amendment of pre-1981 statutes. The potential confusion that arises from the operation of two opposite presumptions is an obvious concern.

The difficulty with the British Columbia option of automatically changing the presumption with respect to all statutes is that the Crown may suddenly find itself subject to certain statutes from which, for good and proper reasons, it ought to be immune. However, for a number of reasons, we consider this a much less significant concern than those presented by the Prince Edward Island option.

First, as we have indicated, the proposed change will be more one of rationalization and simplification than of substance. The broad and various exceptions and distinctions that have been created with respect to the presumption of Crown immunity have nearly eaten away the rule. By virtue of these developments, most statutes now, in fact, apply to the Crown. To the extent that the change is one of substance, removing Crown immunity, we expect that it will generally be desirable. Crown immunity should be the exception and not the rule.

Nevertheless, as we have repeatedly acknowledged, it may be entirely appropriate and important that the Crown be immune from the operation of certain statutes. The answer to this concern is to put the onus on the Ministry responsible for any particular statute to identify those statutes for which Crown immunity is necessary and appropriate and to amend that legislation to specifically provide that the Act does not bind the Crown.

Accordingly, the Commission recommends that the *Interpretation Act* should be amended to provide that every act and regulation made under it binds the Crown unless the Act or regulation specifically provides otherwise.[71]

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[70] A third approach would be to make the change effective from the next revision of the Ontario statutes, which would provide an opportunity for a review of the statutes and the addition of new immunity clauses where they were thought to be necessary.

The Commission would prefer this last option if it were confident that the reform would be in place in 1990, which is the date of the next revision of the Ontario statutes. It now seems too late to hope for such early adoption. The Commission does not think that the reform should be postponed until the year 2000. That is an unnecessarily long wait for a much-needed reform.

[71] Draft Act, s. 13.

RECOMMENDATION

The Commission makes the following recommendation:

1. The *Interpretation Act* should be amended to provide that every Act and regulation made under it binds the Crown unless the Act or regulation specifically provides otherwise.

CHAPTER 8

CROWN AGENCIES

1. PRESENT LAW

(a) Introduction

In this chapter, we consider when a public person or body is considered to be a Crown agent possessing the attributes, and therefore the immunities and privileges, of the Crown. This question arises not only with respect to corporations, but also unincorporated bodies, offices outside government ministries, and natural persons who are officers of the Crown. However, for ease of exposition in this chapter, we shall generally refer to public corporations. Unless the contrary is indicated, it should be assumed that the same rules are applicable to unincorporated public bodies and public officers as to public corporations.

The question whether a public corporation is a Crown agent has arisen most frequently in cases where the corporation has claimed the benefit of Crown immunity from a statute that does not bind the Crown. However, as the preceding chapters indicate, this question can arise in any situation where the Crown may be treated differently from other persons. If the recommendations of the previous chapters of this report are accepted, the legal position of the Crown will be virtually assimilated to that of a private person. The Crown will, for the most part, be subject to the same remedies, the same procedures and the same substantive law, including statute law, as a private person. The significance of the question whether a public corporation is a Crown agent will therefore be considerably diminished.

However, the question whether a person, corporate or natural, is a Crown agent will not go away entirely, for two reasons. First, a particular statute may expressly create a special immunity or other provision specifically applicable to the Crown. The question will then arise as to which bodies that provision applies. Secondly, where a person alleges injury by a public body, the question will arise whether it is the public body in its own right, or the Crown, that is the appropriate defendant.

The fact that a public corporation is established by government, and may be operated using public funds, does not necessarily mean that it is a Crown agent. Nor does the designation "Crown corporation" necessarily import that status. As a general rule, under the current law discussed below, a public body will be considered an agent of the Crown only if it satisfies

the common law test of control, or if it is expressly designated by statute to be an agent of the Crown.

(b) Crown Agent at Common Law

At common law, the question whether a public body is an agent of the Crown depends upon "the nature and degree of control which the Crown exercises over it".[1] If a public body is controlled by a minister or the cabinet, in a way similar to that of a government Ministry, it is considered an agent of the Crown. If, on the other hand, the public body is largely free of ministerial control, it is not an agent of the Crown.

The degree of control that will determine status as a Crown agent is not capable of precise definition. In *R. v. Eldorado Nuclear Ltd.*,[2] Dickson J. (as he then was) observed: "[t]he greater the control, the more likely it is that the person will be recognized as a Crown agent". Control, in this context, means *de jure* control, not *de facto* control; it is the degree of control that a minister is legally entitled to exercise that is relevant, not the degree of control that he may in fact exercise.

(c) Designation by Statute

(i) General Rule

If a statute expressly provides that a public corporation is "an agent of the Crown", then the corporation is an agent of the Crown, regardless of whether or not it is subject to the control of a minister of the Crown.[3] An express stipulation that a public corporation is an agent of the Crown is conclusive. However, in Ontario, it is rare to find such an express statutory provision that a public body is a Crown agent.[4]

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[1] A long line of authority supports this "control test". The quoted language is the formulation that has been approved by the Supreme Court of Canada in *Westeel-Rosco v. Board of Governors of South Saskatchewan Hospital Centre*, [1977] 2 S.C.R. 238, at 249-50, 69 D.L.R. (3d) 334; *Fidelity Insurance Co. v. Cronkhite Supply Ltd.*, [1979] 2 S.C.R. 27, at 29, 102 D.L.R. (3d) 255; and *Northern Pipeline Agency v. Perehinec*, [1983] 2 S.C.R. 513, at 519, 4 D.L.R. (4th) (subsequent reference is to 4 D.L.R.).

[2] [1983] 2 S.C.R. 551, at 573, 4 D.L.R. (4th) 193 (subsequent references are to [1983] 2 S.C.R.).

[3] *Ibid.*, at 576.

[4] The Commission's search of the Ontario statutes revealed only four such provisions: *IDEA Corporation Act, 1981*, S.O. 1981, c. 34, s. 18; *Ontario Deposit Insurance Corporation Act*, R.S.O. 1980, c. 328, s. 2; *Ontario Heritage Act*, R.S.O. 1980, c. 337, s. 11; and *Technology Centres Act, 1982*, S.O. 1982, c. 39, s. 16. The Commission also found three provisions expressly stating that a public body was not an agent of the Crown: *Ontario Energy Corporation Act*, R.S.O. 1980, c. 333, s. 12; *Ontario Transportation Development Corporation Act*, R.S.O. 1980, c. 358, s. 13; and *Urban Transportation Development Corporation Act*, R.S.O. 1980, c. 518, s. 2.

(ii) *The Crown Agency Act*

Ontario's *Crown Agency Act*[5] appears to stipulate by statute an entire class of public corporations to be agents of the Crown.[6] The Act provides as follows:

> 1. In this Act, 'Crown agency' means a board, commission, railway, public utility, university, manufactory, company or agency, owned, controlled or operated by Her Majesty in right of Ontario, or by the Government of Ontario, or under the authority of the Legislature or the Lieutenant Governor in Council.
>
> 2. A Crown agency is for all its purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty.
>
> 3. This Act does not affect Ontario Hydro.

Although the first qualifying phrase of section 1, "owned, controlled or operated by Her Majesty in right of Ontario, or by the Government of Ontario", does not seem to add to the common law test of control, the closing phrase, "or under the authority of the Legislature or the Lieutenant Governor in Council", appears on its face to significantly expand the class of Crown agencies to all bodies acting under statutory authority. For example, a municipal corporation, acts "under the authority of the Legislature"; however, it is not a Crown agent at common law because it is not controlled by the provincial government. Indeed, even a private business corporation could be said to be operated "under the authority of the Legislature", since its status as a corporation depends upon the statute under which the corporation was incorporated.

Nevertheless, section 1 of the Act has not changed or added to the common law control test of Crown agency. Since the Act was passed in 1959, Ontario courts have often been called upon to determine the status of a variety of public bodies. And although the courts have nearly always made reference to the *Crown Agency Act*, in virtually every reported case the court has determined the issue solely by recourse to the control test.[7]

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[5] R.S.O. 1980, c. 106, s. 1.

[6] In the federal jurisdiction, the *Government Corporations Operation Act*, R.S.C. 1985, c. G-4, s. 3, provides that certain Crown-owned companies are agents of the Crown.

[7] *R v. Ontario Labour Relations Board; Ex parte Ontario Food Terminal Board*, [1963] 2 O.R. 91, 38 D.L.R. (2d) 530 (C.A.); *R. v. Ontario Labour Relations Board; Ex parte Ontario Housing Corp.*, [1971] 2 O.R. 723, 19 D.L.R. (3d) 47 (H.C.J.); *Pounder v. Carl C. Schaum Construction Ltd.*, [1972] 2 O.R. 616, 26 D.L.R. (3d) 284 (H.C.J.); *Pike v. Council of Ontario College of Art*, [1972] 3 O.R. 808, 29 D.L.R. (3d) 544 (H.C.J.); *Fairbank Lumber Co. v. O'Connor* (1974), 4 O.R. (2d) 576 (Co. Ct.); *MacLean v. Liquor Licence Board of Ontario* (1974), 5 O.R. (2d) 580, 51 D.L.R. (3d) 64 (H.C.J.), aff'd (1975), 9 O.R. (2d) 597, 61 D.L.R. (3d) 237 (Div. Ct.); *Wren v. Superintendent of Insurance* (1976), 12 O.R. (2d) 190, 1 C.P.C. 145 (H.C.J.); *Re McGruer & Clark Ltd.* (1976), 13 O.R. (2d)

None of the cases embarked on a detailed analysis of the definition of Crown agency in the Act, nor made any attempt to explain what the closing words of the definition might mean. However, the accumulation of authority makes it reasonably safe to conclude that the *Crown Agency Act* has not significantly expanded the common law category of Crown agents.

The leading case is the decision of the Ontario Court of Appeal in *R. v. Ontario Labour Relations Board; Ex parte Ontario Food Terminal Board*,[8] which is cited in nearly all the subsequent cases. While the Ontario Food Terminal Board was "operated . . . under the authority of the Legislature" in the most obvious sense of those words, the court nevertheless held that the absence of governmental control over the Board denied it the status of a Crown agent.

The unusual nature of the *Crown Agency Act*, and the absence of any effect by it on the substantive principles determining Crown agency status, may be explained in part by a study by Colin H. McNairn.[9] It appears that the language of the *Crown Agency Act* was copied from a federal *Excise Tax Act*, with the sole purpose of achieving an exemption from excise tax for Ontario public corporations. The Act did not succeed in obtaining the exemption. This curious origin may explain the courts' reluctance to read its language as radically transforming the common law definition of Crown agent.

Another possible reason for the virtual disregard of the language of the *Crown Agency Act* is the now familiar hostility of courts to the special immunities of the Crown. As we have indicated, courts have repeatedly criticized, and used ingenious means to limit, these immunities. If interpreted literally, the *Crown Agency Act* would greatly expand the number of public bodies in Ontario entitled to share the immunities of the Crown. In the absence of any clear understanding that such an expansion was truly the legislative intent, it is not surprising that the courts would "read down" the broad language of the Act to avoid such a retrogressive result.

(d) *Ultra Vires* Activity

The Crown immunity enjoyed by virtue of an express designation as agent of the Crown may nevertheless be lost if the public body acts *ultra vires*, or outside its statutory jurisdiction. For example, in *Canadian Broadcasting Corporation v. The Queen*,[10] the Supreme Court of Canada was asked

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385, 71 D.L.R. (3d) 175 (S.C. in Btcy.); and *Re Canada Dairies Corp.* (1981), 131 D.L.R. (3d) 605 (Ont. S.C. in Btcy.).

[8] *Supra*, note 7.

[9] McNairn, "The Ontario Crown Agency Act" (1973), 6 Ottawa L. Rev. 1.

[10] [1983] 1 S.C.R. 339, 145 D.L.R. (3d) 42.

to determine whether the CBC was bound by the *Criminal Code*[11] provision prohibiting the exhibition of obscene films. The *Criminal Code* provision did not expressly bind the Crown, and the statute that established the CBC provided that the corporation was "an agent of Her Majesty". However, the CBC was subject to regulations which, among other things, expressly prohibited it from broadcasting obscene material. Therefore, when broadcasting the obscene film, the CBC was acting outside its powers.[12] Accordingly, the court held that the CBC was bound by the *Criminal Code* provision, and was liable to prosecution for exhibiting an obscene film.

(e) Direct Liability of a Crown Agent

(i) Introduction

The question whether a Crown agent is liable to be sued directly in its own name, or whether the Crown itself must be sued for the acts or omissions of its agent, breaks down into two issues. First, as a matter of procedure, is the Crown agent an entity that can be sued in its own name? If so, as a substantive matter, to what extent is the Crown agent, rather than the Crown, responsible for its own acts or omissions or those of its servants?

(ii) Liability to be Sued

With respect to the first, procedural, question, if the Crown agent is incorporated, the general rule is that it is an entity that can sue or be sued in its own name. Capacity to sue or be sued is one of the attributes of legal personality that is possessed by a corporation.[13] While the general rule may be reinforced by an express declaration in the constituting statute that the corporation is suable, such a declaration is not necessary. This general rule may be abrogated for a particular corporation by a statement in the constituting statute that the corporation is not suable.

If the Crown agent is unincorporated, the general rule is that it lacks a distinct legal personality and, for that reason, is not an entity that can

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[11] R.S.C. 1970, c. C-34, ss. 2 and 159(1)(a).

[12] Compare *CBC v. Attorney General for Ontario*, [1959] S.C.R. 188, 16 D.L.R. (2d) 609, in which the CBC was held to not be bound by *Lord's Day Act*, R.S.C. 1952, c. 171, because broadcasting on Sunday was within CBC's statutory mandate. See, also, *R. v. Eldorado Nuclear Ltd.*, *supra*, note 2, at 213, in which Eldorado was held not to be bound by the *Combines Investigation Act*, R.S.C. 1970, c. C-23, now R.S.C. 1985, c. C-34, because "marketing arrangements" were within its statutory powers.

[13] While this rule is explicit in the *Interpretation Act*, R.S.O. 1980, c. 219, s. 26, it would follow in any event from the fact of incorporation: *Rattenbury v. Land Settlement Board*, [1929] S.C.R. 52, [1929] 1 D.L.R. 242, holding that the Board could be sued despite the silence of the incorporating statute.

sue or be sued in its own name.[14] However, if the constituting statute contains an express provision making the entity suable, the entity can be sued. Moreover, even in the absence of such an express provision, the statute may still be interpreted as implicitly making the entity suable. For example, if the constituting statute endows the entity with the capacity to hold property or to enter into contracts, then the entity will be held to be suable by necessary implication.[15]

(iii) Liability Under Substantive Law

Assuming that a Crown agent is a suable entity, the next question is whether the rules of substantive law operate to impose direct liability on the Crown agent. The general rule, discussed below, is that the position of a Crown agent is assimilated to that of an individual Crown servant, so that a Crown agent is directly liable in those circumstances where a Crown servant would be personally liable.

a. Liability of Crown Agent in Tort

In tort, the leading case is *Conseil des Ports Nationaux v. Langelier*,[16] in which property owners sued the National Harbours Board for an injunction restraining the Board from construction works that constituted the tort of nuisance. The Board was a corporation that was expressly designated by its statute to be "the agent of Her Majesty in right of Canada". The Board defended the action on the basis that the Crown itself was the only proper defendant to such an action. However, the Crown itself was immune from injunctive relief,[17] which is no doubt why only the Board was sued.

The Supreme Court of Canada held that the action was properly brought against the Board. Martland J. pointed out that individual Crown servants were personally liable for torts committed in the service of the Crown, and held that a corporation that was an agent of the Crown was in the same situation.[18] Just as an individual Crown servant could be enjoined from committing a tort, so a corporate Crown agent could also be enjoined.

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[14] *MacKenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517, 96 L.J.K.B. 1145 (C.A.), holding that the Air Council, an unincorporated body, could not be sued in tort.

[15] See, for example, *Northern Pipeline Agency v. Perehinec*, *supra*, note 1, at 21.

[16] [1969] S.C.R. 60.

[17] The federal *Crown Liability Act* denied injunctive relief against the Crown.

[18] *Conseil des Ports Nationaux v. Langelier*, *supra*, note 16, at 72, approving *obiter dictum* of Atkin L.J. in *Mackenzie-Kennedy v. Air Council*, *supra*, note 14, at 532-33.

b. *Vicarious Liability of the Crown Agent for Acts of Its Servants*

The fact that a corporate Crown agent is assimilated to an individual Crown servant has significance for claims of vicarious liability against a Crown agent for the acts of its own servants. The reasoning of the court in *Conseil des Ports Nationaux v. Langelier* makes clear that a Crown agent could be directly sued for damages only if it committed the tort *directly*. This would occur, for example, if the board of directors passed a resolution ordering the commission of the tortious act, or if an officer who was the "directing mind" of the corporation ordered or committed the tortious act.[19]

However, because it is treated like an individual Crown servant, the Crown agent would *not* be vicariously liable for a tort committed by its employee in the course of employment. An individual Crown servant is not vicariously liable for the torts of subordinate Crown servants, because the superior servant is not the employer of the subordinate servant. Rather, the superior and the subordinate are both fellow servants of the Crown, and only the Crown itself is vicariously liable for the torts of its servants.[20] Therefore, like an individual Crown servant, a corporate Crown agent is immune from vicarious liability for the torts of its employees.[21]

c. *Vicarious Liability of the Crown for Acts of Crown Agent*

Where a corporate Crown agent is directly liable in tort, the injured plaintiff may sue the corporation for damages or other relief. The question may also arise whether the plaintiff can recover from the Crown on the basis of vicarious liability for the acts of the Crown agent. Since a corporate Crown agent is equivalent in law to an individual Crown servant for whom the Crown is vicariously liable, the answer should be yes. However, section 2(2)(b) of the *Proceedings Against the Crown Act*[22] exempts the Crown from liability "in respect of a cause of action that is enforceable

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[19] *MacKenzie-Kennedy v. Air Council*, *supra*, note 14, at 533, aff'g, *obiter*, the liability of a corporate Crown agent for a tort committed by the corporation's board of directors.

[20] *Bainbridge v. Postmaster-General*, [1906] 1 K.B. 178 (C.A.), holding the Postmaster-General not liable for torts committed by subordinates.

[21] *Quebec Liquor Commission v. Moore*, [1924] S.C.R. 540, holding the Commission not liable for negligence of servant, and *Peccin v. Lonegan*, [1934] O.R. 701, [1934] 4 D.L.R. 776 (C.A.), holding Railway Commission not liable for negligence of servants. Broader statements of immunity in the latter case were disapproved in *Conseil des Ports Nationaux v. Langelier*, *supra*, note 16, at 70. The immunity from vicarious liability of a corporate Crown agent was recognized, *obiter*, in that case, at 73. See, also, Mundell, Special Lectures of the Society of Upper Canada, *Remedies* (1967), 149, at 176, and Goldenberg, Special Lectures of the Law Society of Upper Canada, *New Developments in the Law of Torts* (1973), 341, at 362.

[22] R.S.O. 1980, c. 393, s. 2(2)(b).

against a corporation or other agency of the Crown". While the purpose and scope of this provision is not entirely clear, it appears to preclude an action against the Crown that is premised on vicarious liability for the tort of a corporate[23] Crown agent. By contrast, in the federal jurisdiction, and in the United Kingdom, New Zealand and Australia, the general common law rules governing vicarious liability render the Crown liable for the tort of a corporation that is an agent or servant of the Crown.

Nevertheless, section 2(2)(b) of the *Proceedings Against the Crown Act* appears to have little significance. Cases where a corporate Crown agent is directly liable in tort will not be common, because direct liability must involve a tortious act by the governing body or the directing mind of the corporation. Even where there is a tortious act by the governing body or directing mind of the corporation, section 2(2)(b) will not necessarily preclude an action against the Crown. If there was a tortious act by an ordinary employee of the Crown agent, as well as by the governing body or directing mind, the Crown could be held vicariously liable for the tort of the ordinary Crown servant.

d. Liability of Crown Agent in Contract

As we have discussed,[24] as a general rule an agent is not personally liable under a contract made on behalf of the agent's principal. However, if the agent contracts personally, as well as on behalf of the principal, then the agent is liable as well as the principal. This exception to the general rule applies to Crown agents.[25]

Section 2(2)(b) of *The Proceedings Against the Crown Act*, which exempts the Crown from liability "in respect of a cause of action that is enforceable against a corporation or other agency of the Crown", probably does not immunize the Crown from liability for breach of contract where both the Crown and the Crown agent are liable for the breach. Since the Crown was liable in contract at common law, the Act did not need to, and did not in fact, subject the Crown to liability in contract. The exempting provision should therefore have no application to causes of action in contract.

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[23] While the phrase "or other agency" is obscure, Goldenberg, *supra*, note 21, at 360, points out that s. 5(1)(a) expressly imposes vicarious liability for the torts of "servants or agents", so that "the legislation would contradict itself if clause 2(2)(b) were taken to embrace natural persons".

[24] *Supra*, ch. 3, sec. 1(g).

[25] *International Railway Co. v. Niagara Parks Commission*, [1941] A.C. 328, [1941] 2 All E.R. 456 (P.C.); *Yeats v. Central Mortgage and Housing Corp.*, [1950] S.C.R. 513, [1950] 3 D.L.R. 801; and *Northern Pipeline v. Perehinec*, *supra*, note 1.

e. Crown Immunities

The courts have carved out an important exception to the Crown's immunities by affirming that a Crown agent is liable in its own right wherever an individual Crown servant would be liable. Where a Crown agent is directly sued in its own right, it cannot rely on any of the residual immunities that are available to the Crown.

2. CASE FOR REFORM AND RECOMMENDATIONS

In our view, the current law governing the definition of Crown agency, and its implications, operates in a generally satisfactory manner. If our proposals are implemented, and residual Crown immunities are largely abolished, status as a Crown agent will no longer be the key to a privileged legal position, and its significance will accordingly be much reduced. The chief importance of the question of Crown agency status will be to determine whether it is the Crown or the Crown agent that should be sued. The issue of who is the appropriate defendant is a familiar one in litigation, and, as far as we can see, raises no particularly unique problems in this context.

We have nevertheless considered whether the control test should be abolished as a determinant of Crown agency status. As we indicated, the control test is inherently uncertain, and extensive case law indicates that it may not be capable of precise definition. If the control test were simply abolished, only an express statutory designation would suffice to confer the status of Crown agent.

However, leaving the issue of status as Crown agency to statutory designation does not appear to us to be a satisfactory solution. While this approach would probably serve to clarify the determination of who is a Crown agent, it would also undoubtedly narrow the range of persons or bodies who are Crown agents, and therefore possibly limit the scope of vicarious liability of the Crown. In our view, where the Crown controls the act of a public body, it should be responsible for the acts of that body. There appears to be no principled reason to distinguish between the act of a controlled public corporation and the act of a government ministry. A person injured by either should be entitled to seek recovery from the government that had the legal power to control the act.

It is, of course, conceivable that the control test could be abolished, but replaced by another test of Crown agency. However, we do not feel confident that any new definition we might devise would lend itself to greater precision or certainty than the current control test, which at least has the advantage of familiarity and an extensive body of case law to aid in its application.

Accordingly, we recommend that a Crown agent should continue to be identified by either the control test or by express declaration in the

relevant statute. Once identified, the Crown agent acting within its powers should share any remaining Crown privileges or immunities. The liability of a Crown agent, and the vicarious liability of the Crown, should be determined according to the same rules that apply with respect to individual Crown servants.

We further recommend that the *Crown Agency Act*, which purports to confer Crown agency status on an ill-defined class of public bodies, should be repealed.[26]

Finally, as we discussed above, section 2(2)(b) of the *Proceedings Against the Crown Act*, which exempts the Crown from liability in respect of a cause of action that is enforceable against a corporate Crown agent, is unsatisfactory. It has the unacceptable effect of immunizing the Crown from vicarious liability for the acts of its agents. Moreover, it is of significance only in rare instances of direct liability by Crown agents in tort and needlessly complicates the law. Accordingly, we recommend that section 2(2)(b) of the *Proceedings Against the Crown Act* should be repealed.

Recommendations

The Commission makes the following recommendations:

1. A Crown agent should continue to be identified by either the control test or by express declaration in the relevant statute.

2. The *Crown Agency Act* should be repealed.

3. Section 2(2)(b) of the *Proceedings Against the Crown Act*, which exempts the Crown from liability in respect of a cause of action that is enforceable against a corporate Crown agent, should be repealed.

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[26] *Crown Liability Act*, *infra*, Appendix 1, s. 12.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

CHAPTER 1: GENERAL INTRODUCTION

1. A new *Crown Liability Act* should be enacted to include the reform proposals made in this report.

2. The privileges of the Crown in respect of civil liabilities and civil proceedings should be abolished, and the Crown and its servants and agents should be subject to all the civil liabilities and rules of procedure that are applicable to other persons who are of full age and capacity.

3. Recommendation 2 should apply with respect to all causes of action, including tort, contract, restitution, and breach of trust.

4. The responsibility for reviewing legislation, with an eye to identifying consequential amendments not specifically recommended in this report, should be left to each ministry responsible for the particular legislation.

CHAPTER 2: TORT

5. All statutory immunity clauses protecting Crown servants should be repealed and replaced by an appropriate scheme of indemnity.

6. The abolition of all statutory immunity clauses should come into force two years following the proclamation of the proposed *Crown Liability Act*.

7. Every member of a board, commission or tribunal should enjoy the same immunity accorded to superior court judges when performing duties of a judicial nature.

8. Section 2(2)(d) of the *Proceedings Against the Crown Act*, which exempts the Crown from liability in respect of anything done in the due enforcement of the criminal law, should be repealed.

9. Section 5(5) of the *Proceedings Against the Crown Act*, which immunizes the Crown from liability with respect to property that vests by operation of law, should be abolished.

10. Section 5(6) of the *Proceedings Against the Crown Act* should be repealed, and the proposed *Crown Liability Act* should expressly provide that the Crown is vicariously liable for the tort of any person committed in the course of the exercise or purported exercise of judicial responsibilities or duties.

CHAPTER 3: CONTRACT

11. Our general recommendation 2 will ensure that the Crown and its agents and servants will be subject to all contractual liability to which they would be liable if the Crown were a person of full age and capacity.

12. The doctrine that the Crown cannot fetter its discretion by contract should be abrogated by the proposed *Crown Liability Act*. The Act should provide that a contract made on behalf of the Crown is valid and enforceable even if the contract fetters discretionary powers conferred by statute or common law.

13. Recommendation 5, that statutory immunity clauses should be abolished and replaced by an appropriate scheme of indemnity for Crown employees, should apply as well with respect to contractual liability of Crown servants and agents.

CHAPTER 4: REMEDIES

14. Since damages are available against the Crown, no change in the law is needed or recommended.

15. The new *Crown Liability Act* should provide that the remedies of injunction and specific performance are available against the Crown.

16. The procedure for obtaining relief against the Crown by an action for a declaration against the Attorney General, known as the *Dyson* procedure, should be abolished.

17. The immunity of the Crown from orders in the nature of mandamus, prohibition, and certiorari under the *Judicial Review Procedure Act* should be abolished.

18. Since there is no Crown immunity from *habeas corpus*, and no such immunity is desirable, no change in the law is recommended.

CHAPTER 5: PROCEDURAL AND RELATED MATTERS: EVIDENCE, APPEALS, DISCOVERY, JURY TRIALS, AND LIMITATION OF ACTIONS

19. (a) The common law rule of Crown privilege, as established in *Carey v. The Queen in Right of Ontario*, is generally satisfactory and need not be altered. However, for greater certainty, we recommend that the rule should be expressly included as a part of the new *Crown Liability Act*.

    (b) The statutory provision should provide that, where Crown privilege is claimed with respect to any evidence, documentary or otherwise, the court may examine the evidence.

    (c) The court should allow disclosure of the evidence, unless it is satisfied that the injury to the public interest that would be caused by disclosure would outweigh the injury to the administration of justice that would be caused by withholding the evidence.

    (d) The proposed Act should provide that the court has the power to inspect privately the evidence for which Crown privilege is claimed.

    (e) In the appropriate circumstances, the court should be entitled to order limited disclosure, subject to such terms and conditions as it deems necessary.

20. Section 12 of the *Proceedings Against the Crown Act*, which relates to the issues of disclosure and privilege, should be repealed.

21. The Crown should be liable to give discovery to the same extent and in the same manner as if the Crown were a corporation.

22. Section 15 of the *Proceedings Against the Crown Act*, which prohibits jury trials against the Crown, should be repealed.

23. The proposals in the Commission's 1969 *Report on Limitation of Actions* should be implemented.

CHAPTER 6: ENFORCEMENT OF JUDGMENTS, COSTS, AND INTEREST

24. The Crown's immunity from execution should be continued.

25. The Crown's immunity from garnishment as a means of enforcing judgment debts owed by the Crown should be continued.

26. The residual immunities from garnishment of debts owed by the Crown to a third party judgment debtor should be eliminated, and all such debts owed by the Crown should be subject to garnishment.

27. The Crown should be liable for civil contempt for breach of a court order to the same extent as if the Crown were a corporation. The court should also have the power, on finding the Crown to be in contempt, to make an order against an officer or servant of the Crown. The court should normally direct its contempt order to a minister, who should bear responsibility for all the work of the ministry under her control. However, in appropriate circumstances, the court should be able to penetrate the bureaucracy and fasten its orders on an individual below the ministerial level, as well as on the responsible minister.

28. A new *Crown Liability Act* should provide that the Crown shall receive and pay costs in accordance with the same rules as apply between private parties.

29. Since the Crown is under the same obligation to pay interest as a private person, and there is no reason to place the Crown in a different position, no change in the law is recommended.

CHAPTER 7: STATUTES

30. The *Interpretation Act* should be amended to provide that every Act and regulation made under it binds the Crown unless the Act or regulation specifically provides otherwise.

CHAPTER 8: CROWN AGENCIES

31. A Crown agent should continue to be identified by either the control test or by express declaration in the relevant statute.

32. The *Crown Agency Act* should be repealed.

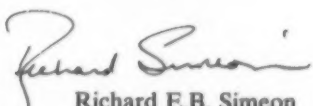
33. Section 2(2)(b) of the *Proceedings Against the Crown Act*, which exempts the Crown from liability in respect of a cause of action that is enforceable against a corporate Crown agent, should be repealed.

CONCLUSION

In this report, we have made recommendations that would make the law of Crown liability in Ontario less complex and more fair to private individuals and the Crown and bring it into conformity with the general principles underlying the *Canadian Charter of Rights and Freedoms*. We wish to express once again our appreciation to all those who have contributed to this important undertaking, and particularly to Professor Peter Hogg.

All of which is respectfully submitted.

Rosalie S. Abella
Chair



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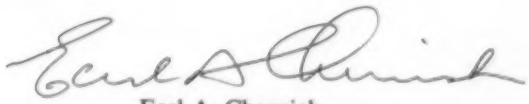
Vice Chair



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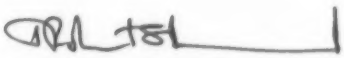

J. Robert S. Prichard
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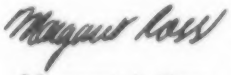

Margaret A. Ross
Commissioner

December 15, 1989

APPENDIX 1

Draft Act

Bill 00 **199__**

An Act to reform Crown Privileges in respect of Civil Liabilities and Proceedings

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. In this Act, — Interpretation

(a) a reference to the Crown is a reference to Her Majesty the Queen in right of Ontario; *

(b) a reference to a servant, when used in relation to the Crown, includes a Minister of the Crown. *

2.—(1) Except as specifically provided by this Act or any other statute, the privileges of the Crown in respect of civil liabilities and civil proceedings are abolished and the Crown and its servants and agents are subject to all the civil liabilities and rules of procedure that are applicable to other persons who are of full age and capacity. — Crown privileges abolished

(2) Without derogating from the generality of subsection (1), — Idem

(a) a claim against the Crown may be enforced as of right by proceedings against the Crown without petition of right or the fiat of the Lieutenant Governor;

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*The provisions marked by an asterisk are not dealt with in the report and are carried forward without substantive modification.

(b) the civil liabilities referred to in subsection (1) include liability under any cause of action, including tort, contract, restitution and breach of trust;

(c) the remedies of injunction and specific performance are available against the Crown and its servants and agents;

(d) the remedies in the nature of mandamus, prohibition and certiorari under the *Judicial Review Procedure Act* are available against the Crown and its servants and agents;

(e) a contract made by or on behalf of the Crown is not invalid or unenforceable for the reason that it fetters discretionary powers conferred by statute or common law;

(f) a Crown servant or agent is not immune from liability for a breach of warranty of authority to contract;

(g) money owed by the Crown to a judgment debtor is subject to garnishment;

(h) the Crown is liable for civil contempt for a breach of a court order to the same extent as a corporation and, where the Crown is in contempt, the contempt order shall be made against a Minister of the Crown and may be made against another servant or agent of the Crown;

(i) the Crown is liable to give discovery in a proceeding to the same extent and in the same manner as a corporation; and

(j) the Crown shall receive and pay costs in a proceeding in accordance with the same rules as apply to other parties in the proceeding;

*

(k) liability under the law relating to indemnity and contribution is enforceable by and against the Crown.

Exceptions

3. Notwithstanding section 2,

(a) no execution lies against Crown property; and

(b) money owing to the Crown is not subject to garnishment.

"Dyson" procedure abolished

4. The procedure for obtaining relief against the Crown by an action for a declaration against the Attorney General is abolished.

Vicarious liability of the crown

5.—(1) Where a function is conferred or imposed upon a servant of the Crown either by a rule of the common law or by statute, and the servant commits a tort in the course of performing or purporting to perform the function, the liability of the Crown in respect of the tort shall be such as it would have been if the function had been conferred or imposed by instructions lawfully given by the Crown.

Idem re judicial functions

(2) The Crown is vicariously liable for the torts of persons committed in the course of the exercise or purported exercise of judicial responsibilities or duties.

Quasi-judicial Immunity

6. Every member of a board, commission, agency or tribunal, when fulfilling judicial duties or responsibilities, has the same immunity from liability as a judge of the Supreme Court of Ontario.

Crown privilege re evidence

7.—(1) Where Crown privilege is claimed in respect of evidence, the court may examine the evidence in private and shall allow the disclosure of the evidence unless the court is satisfied that the injury to the public interest that would result from the disclosure would outweigh the injury to the administration of justice that would result from withholding the evidence.

Idem

(2) Where a court allows disclosure of evidence in respect of which Crown privilege is claimed, the court may limit the evidence that may be disclosed and attach such terms and conditions to the disclosure as the court considers appropriate.

Appropriation of money for court awards

8. The Treasurer of Ontario shall pay out of the Consolidated Revenue Fund the amount payable by the Crown under an order of a court that is final or under a settlement of a proceeding in a court.

Garnishment procedure

9.—(1) A garnishment is effective against the Crown only in respect of amounts that are payable to the person named in the notice of garnishment by or on behalf of the administrative unit that is served with the notice of garnishment.

Administrative unit

(2) In subsection (1) an administrative unit is a Ministry

of the Government of Ontario, a Crown agency or the Office of the Assembly.

Regulations

(3) The Lieutenant Governor in Council may make regulations,

(a) prescribing the method of service on the Crown of notices of garnishment in place of the method prescribed in subsection 10(2);

(b) providing that a notice of garnishment issued against the Crown is not effective unless a statement of particulars in the prescribed form is served with the notice of garnishment;

(c) providing that a notice of garnishment issued against the Crown shall be deemed to be served on the day that is the number of days specified in the regulation after the actual date of service or after the effective date of service under the rules of court that issued the notice of garnishment, as the case may be, but the regulation shall not specify a number of days that is more than thirty;

(d) prescribing the form of statement of particulars for the purposes of this section.

Style of Cause

10.—(1) In a proceeding by or against the Crown, the Crown shall be designated "Her Majesty the Queen in right of Ontario".

Service

(2) In a proceeding by or against the Crown, a document to be served personally on the Crown shall be served by leaving a copy of the document with a solicitor in the Crown Law Office (Civil Law) of the Ministry of the Attorney General.

Immunity of Crown servants abolished

11.—(1) Every statutory provision that confers an immunity on servants of the Crown from liability that is incurred in the performance or purported performance of their duties under a statute is repealed.

(2) Subsection (1) comes into force two years following the proclamation of this Act.

(The purpose of the delay is to allow time for the putting in place of a scheme of indemnity where appropriate—see chapter 2, recommendation 1).

12. The *Crown Agency Act*, being chapter 106 of the Revised Statutes of Ontario, 1980, is repealed.

13. Section 11 of the *Interpretation Act*, being chapter 219 of the Revised Statutes of Ontario, 1980, is repealed and the following substituted therefor:

> 11. Every Act and regulation made under it binds the Crown unless the Act or regulation specifically provides otherwise.

14. The *Proceedings Against the Crown Act*, being chapter 393 of the Revised Statutes of Ontario, 1980, the *Proceedings Against the Crown Amendment Act, 1983*, being chapter 88, section 203 of the *Courts of Justice Act, 1984*, being chapter 11, section 16 of the *Support and Custody Orders Act, 1985*, being chapter 6, and the *Proceedings Against the Crown Amendment Act, 1988*, being chapter 29, are repealed.

Commencement

15. This Act, except section 11, comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

16. The short title of this Act is the *Crown Liability Act*.

APPENDIX 2

ONTARIO LAW REFORM COMMISSION

LIABILITY OF THE CROWN PROJECT

LIST OF RESEARCH PAPERS

1.	Bouchard:	The Presumption of Non-Applicability of Statutes to the Crown: A Comparative Study
2.	Cohen:	Government Liability in Contract
3.	Gertner:	Discovery and Crown Proceedings
4.	Gertner:	The Utility of a Commercial/Non-Commercial Distinction in Proceedings Against the Crown
5.	Hogg:	Crown Agencies
6.	Hogg:	Crown Liability in Tort
7.	Hogg:	Crown Privilege
8.	Hogg:	Enforcement of Judgements Against the Crown
9.	Hogg:	Remedies Against the Crown

Note: It is proposed to deposit the Research Papers in the Legislative Library of Ontario.